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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

Appellants,

v.

RAYMOND G. DeCHAMPLAIN,

Appellee.

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
Facts	3
Proceedings Below	7
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION	15
II. A UNITED STATES DISTRICT COURT HAS JURISDICTION TO REVIEW COLLATERALLY, OTHER THAN BY HABEAS CORPUS, DETERMINATIONS BY A MILITARY COURT-MARTIAL OF CONSTITUTIONAL LAW AND INDIVIDUAL RIGHTS	21
A. There is a strong policy that constitutional rights shall not be denied without an opportunity for judicial review in a federal court	25
B. Judicial precedent supports collateral review of court-martial determinations other than by habeas corpus	28
C. Article 76 was not intended to alter the historical availability of collateral review of court-martial proceedings by means other than habeas corpus	29
D. If Article 76 does bar collateral review other than by habeas corpus, it is unconstitutional	37

Page

III. A UNITED STATES DISTRICT COURT MAY ENJOIN A PENDING COURT-MARTIAL WHERE CLEAR AND SUBSTANTIAL VIOLATIONS OF A SERVICEMAN'S CONSTITUTIONAL RIGHTS WILL OCCUR IF THE COURT-MARTIAL IS ALLOWED TO TAKE PLACE, NO MATERIAL FACTS ARE IN DISPUTE, NO INTERPRETATION OF SPECIALIZED MILITARY LAW IS NECESSARY, AND THERE IS LITTLE PROBABILITY THAT THE RIGHTS ASSERTED CAN BE VINDICATED IN THE MILITARY COURTS 46

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING APPELLEE'S COURT-MARTIAL UNTIL HE AND HIS CHIEF DEFENSE COUNSEL ARE GIVEN FULL ACCESS TO THE EVIDENCE UPON WHICH THE CHARGES ARE BASED 54

V. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE GOVERNMENT EITHER MUST PROVIDE APPELLEE AND HIS CHIEF DEFENSE COUNSEL WITH UNLIMITED ACCESS TO AND USE OF RELEVANT EVIDENCE, SUBJECT TO A PROTECTIVE ORDER AGAINST DISCLOSURE TO THOSE NOT INVOLVED IN THE DEFENSE OF THE CASE, OR IT MUST DISMISS THE CHARGES 60

A. Unlimited access to the documents and record of the prior trial was essential to a proper defense and to effective assistance of counsel 61

Page

B. In a criminal prosecution, the government must disclose to the defendant and his counsel all evidence which would be material or relevant to the defense or suffer dismissal of the case, even when such evidence includes asserted "State Secrets" 64

C. The rule requiring access to relevant evidence applies to courts-martial 68

CONCLUSION 72

TABLE OF AUTHORITIES

Cases:

ABC Books, Inc. v. Benson, 315 F.Supp. 695 (N.D. Tenn. 1970) 18

Abbott Laboratories v. Gardner, 387 U.S. 136 29

Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971) 20

Alderman v. United States, 394 U.S. 165 . . . . . 14, 67, 68

Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) 70

Application of Stapley, 246 F.Supp. 316 (D.Utah 1965) 71

Ascheim v. Quinlan, 314 F.Supp. 685 (M.D. Pa. 1970) 18

Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) 69, 71

Ashley v. Texas, 310 F.2d 80 (5th Cir. 1963), *cert. den.* 375 U.S. 931 65

Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd. on other grounds* 393 U.S. 348 . . . . . 27, 30, 35

Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973) 8, 16

Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) 65

Page

Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974) 70, 71

Billings v. Truesdale, 321 U.S. 542 51

Board of Regents v. Roth, 408 U.S. 564 26

Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968), *cert. den.* 393 U.S. 896 61

Brady v. Maryland, 373 U.S. 83 . . . . . 64, 65

Brown v. United States, 365 F.Supp. 328 (E.D.Pa. 1973) 28

Brownell v. Tom We Shung, 352 U.S. 180 . . . . . 31, 37

Buchanan v. Rhodes, 385 U.S. 3 17

Buell v. Sears, Roebuck and Co., 321 F.2d 468 (10th Cir. 1963) 22

Burford v. Sun Oil Co., 319 U.S. 315 47

Burns v. Wilson, 346 U.S. 137 . . . . . 25, 45, 53, 69

Carlson v. Schlesinger, 364 F.Supp. 626 (D.D.C. 1973) 69

Cort v. Herter, 187 F.Supp. 683 (D.D.C. 1960) 19

Crowell v. Benson, 285 U.S. 22 . . . . . 11, 39

Daigle v. Warner, 490 F.2d 358 (9th Cir. 1974) 71

Darr v. Burford, 339 U.S. 200 47

DeChamplain v. McLucas, 22 U.S.C.M.A. 462, 47 C.M.R. 552 . . . . . 57, 58

Dennis v. United States, 384 U.S. 855 64

Denton v. United States, 144 Ct.Cl. 840 (1959), *cert. den.* 361 U.S. 821 71

Department of Employment v. United States, 385 U.S. 355 19

Dombrowski v. Pfister, 380 U.S. 479 47

Dooley v. Ploger, 491 F.2d 608 (4th Cir. 1974) 51, 52

Page

Duncan v. Kahanamoku, 327 U.S. 304 48

Dynes v. Hoover, 20 How. 65 28

Estep v. United States, 327 U.S. 114 . . . . . 31, 37, 39, 40

Ex Parte McCardle, 7 Wall. 506 38

Ex Parte Milligan, 4 Wall. 2 . . . . . 39, 48

Ex Parte Reed, 100 U.S. 113 28

Ex Parte Yerger, 8 Wall. 85 38

Falbo v. United States, 320 U.S. 549 39

Fay v. Noia, 372 U.S. 391 . . . . . 11, 26

Federal Housing Administration v. The Darlington, 352 U.S. 977 17

Firemen's Ins. Co. v. Robbins Coal Co., 288 F.2d 345 (5th Cir. 1961), *cert. den.* 368 U.S. 875 22

Flemming v. Nestor, 363 U.S. 603 . . . . . 17, 18, 19

Fry v. Layne-Western Co., 282 F.2d 97 (8th Cir. 1960) 22

Gallagher v. Quinn, 362 F.2d 301 (D.C. Cir. 1966), *cert. den.* 385 U.S. 881 . . . . . 26, 27, 30, 45

Gorin v. United States, 312 U.S. 19 . . . . . 14, 61, 62

Gusik v. Schilder, 340 U.S. 128 . . . . . *passim*

Hagopian v. Knowlton, 470 F.2d 20 (2d Cir. 1972) 69

Harmon v. Brucker, 355 U.S. 579 40

Hawks v. Hamill, 288 U.S. 52 47

Henry v. Warner, 357 F.Supp. 495 (C.D. Cal. 1973) 71

Hicks v. Pleasure House, Inc., 404 U.S. 1 . . . . . 10, 17

Hobson v. Hansen, 256 F.Supp. 18 (D.D.C. 1966) 17

Homey v. Resor, 455 F.2d 1345 (D.C. Cir. 1971) 28

Hooper v. Laird, 482 F.2d 784 (D.C. Cir. 1973) 8, 16

Houston v. Moore, 5 Wheat. 1 28

Page

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 . . . . . 10, 15, 17

Jehovah's Witnesses in State of Washington v. Kings Cty. Hosp., 278 F.Supp. 488 (W.D. Wash. 1967) 18

Jencks v. United States, 353 U.S. 657 67

Johnson v. Louisiana, 406 U.S. 356 47

Johnson v. Robison, 415 U.S. 361 . . . . . 29, 30, 31, 37

Jones v. Wade, 475 F.2d 1126 (5th Cir. 1973) 20

Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.* 396 U.S. 1013 26, 28, 53, 70

Kennedy v. Mendoza-Martinez, 372 U.S. 144 . . . . . 18, 19

Landry v. Daley, 280 F.Supp. 929 (N.D. Ill. 1967), 288 F.Supp. 194 (N.D. Ill. 1968) 17

Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967) 65

Levin v. Katzenbach, 368 F.2d 287 (D.C. Cir. 1966) 65

Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973) 8

Lockerty v. Phillips, 319 U.S. 182 39

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 47

McElroy v. Guagliardo, 361 U.S. 281 . . . . . 51, 52

Marbury v. Madison, 1 Cranch 137 . . . . . 38, 44

Martin v. Hunter's Lessee, 1 Wheat. 304 . . . . . 40, 42

Melvin v. Laird, 365 F.Supp. 511 (E.D.N.Y. 1973) 28, 70

Mitchum v. Foster, 407 U.S. 225 46

Monongahela Bridge Co. v. United States, 216 U.S. 177 37

New State Ice Co. v. Liebmann, 285 U.S. 262 47

New York Central Sec. Corp. v. United States, 287 U.S. 12 18

Page

Ng Fung Ho v. White, 259 U.S. 276 40

Noyd v. Bond, 395 U.S. 683 . . . . . 27, 51

O'Callahan v. Parker, 395 U.S. 258 . . . . . *passim*

Palmore v. United States, 411 U.S. 389 . . . . . 39, 40, 42, 43, 44

Parisi v. Davidson, 405 U.S. 34 . . . . . 48, 51, 52-53

Parker v. Levy, ____ U.S. ____, 94 S.Ct. 2547 (1974) 8, 10, 16, 20, 45, 57

Pittsburgh & W.V. Ry. Co. v. United States, 281 U.S. 479 18

Powell v. Alabama, 287 U.S. 45 71

Powell v. United States, 300 U.S. 276 18

Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949) 69

Query v. United States, 316 U.S. 486 19

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 47

Reid v. Covert, 354 U.S. 1 . . . . . 12, 48, 49, 51, 52

Roviaro v. United States, 353 U.S. 53 67

Runkle v. United States, 122 U.S. 543 28

Rusk v. Cort, 372 U.S. 144 19

St. Joseph Stock Yards v. United States, 298 U.S. 38 . . . . . 11, 40

San Antonio School District v. Rodriguez, 411 U.S. 1 47

Schackman v. Arnebergh, 387 U.S. 427 17

Schita v. King, 133 F.2d 283 (8th Cir. 1943) 70

Schroth v. Warner, 353 F.Supp. 1032 (D. Hawaii 1973) 22

Secretary of the Navy v. Avrech, ____ U.S. ____, 94 S.Ct. 3039 (1974) 8, 10, 16, 20, 21, 24, 26

Page

Shapiro v. United States, 107 Ct.Cl. 650, 69 F.Supp. 205 (1947) 71

Shaughnessy v. Pedreiro, 349 U.S. 48 . . . . . 31, 36, 37

Shaw v. United States, 357 F.2d 949 (Ct.Cl. 1966) 69

Sheldon v. Sill, 8 How. 441 40

Sibron v. New York, 392 U.S. 40 26-27

Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968) *cert. den.* 394 U.S. 934 . . . . . 28, 71

Smith v. Whitney, 116 U.S. 167 28

Stark v. Wickard, 321 U.S. 288 40

Steffel v. Thompson 415 U.S. 452 . . . . . 19-20, 47

Stratton v. St. Louis Southwestern Ry. Co., 282 U.S. 10 . . . . . 10, 17, 20

Swaim v. United States, 165 U.S. 553 28

Tillman v. Dade County School Board, 327 F.Supp. 927 (S.D. Fla. 1971) 18

Toth v. Quarles, 350 U.S. 11 . . . . . 45, 48, 49, 52

Truax v. Corrigan, 257 U.S. 312 47

United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973) 61, 71

United States v. Andolschek, 142 F.2d 503, (2d Cir. 1944) 64, 65, 66

United States v. Augenblick, 393 U.S. 348 56

United States v. Beekman, 155 F.2d 580 (2d Cir. 1946) 65, 66, 67

United States v. Bergamo, 154 F.2d 31 (3rd Cir. 1946) 59

United States v. Burr, 25 Fed. Cas. 187 (C.C.Va. 1807) 67

Page

United States v. Butenko, 384 F.2d 554 (3d Cir. 1967) *vacated sub. nom.*, Alderman v. United States, 394 U.S. 165 61

United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. den.* 342 U.S. 920 . . . . . 58, 64, 65, 66, 67

United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) 70, 71

United States v. DeChamplain, A.C.M. 21034, 46 C.M.R. 784 (A.F.B.R. 1972), *aff'd.* 22 U.S.C.M.A. 150, 46 C.M.R. 150 (1973) 4

United States v. Drummond, 354 F.2d 132 (2d Cir. 1965) 62

United States ex rel. Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963) 65

United States ex rel. Mankiewicz v. Ray, 399 F.2d 900 (2d Cir. 1968) 56

United States v. Frischolz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966) 28, 30

United States v. Gorin, 111 F.2d 712 (9th Cir. 1940) 58

United States v. Grayson, 166 F.2d 863 (2d Cir. 1948) 67

United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 265 (1965) 70

United States v. Harvey, 8 U.S.C.M.A. 538, 25 C.M.R. 42 57

United States v. Heine, 151 F.2d 813 (2d Cir. 1945) 14, 61, 62, 63

United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) 70

United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962) 70

Page

United States v. Levy, 39 C.M.R. 672 (ABR 1968), *ptn. for rev. den.* 18 U.S.C.M.A. 627 (1969) 57

United States v. Neville, 7 C.M.R. 180 (1952) 58

United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090 (1974) 38, 44

United States v. Northrup, 31 C.M.R. 559 (1961) 58

United States v. Reynolds, 345 U.S. 1 . . . . . 14, 65

United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), *cert. den.* 344 U.S. 838 61

United States v. Russo and Ellsberg, No. 9373-WMB-CD (C.D. Cal. 1973) 63, 64

United States v. Schlack, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964) 70

United States v. Schneiderman, 106 F.Supp. 731 (S.D.Cal. 1952) 67

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 49

United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964) 70

United States v. Tempia, 16 U.S.C.M.A. 625, 37 C.M.R. 249 (1967) 70

Whelchel v. McDonald, 340 U.S. 122 . . . . . 56, 71

Willingham v. Morgan, 395 U.S. 402 22

Wisconsin v. Constantineau, 400 U.S. 433 26

Wise v. Withers, 3 Cranch. 331 28

Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), *cert. den.* 401 U.S. 982 70

Yakus v. United States, 321 U.S. 414 . . . . . 39, 70

Younger v. Harris, 401 U.S. 37 . . . . . 14, 19, 47, 49, 59, 60

U.S. Constitution.

Article III . . . . . *passim*

	Page
First Amendment	69, 70
Fifth Amendment	2, 22, 40, 45, 55
Sixth Amendment	2, 22, 55
Statutes:	
Articles of War	
Article 50(h)	31, 32, 34, 35, 36
Article 50½	31, 32, 34
Article 53	29, 32, 36
District of Columbia Court Reform and Criminal Procedure Act, 84 Stat. 473	39
Uniform Code of Military Justice, 10 U.S.C. §§801, *et seq.*	30, 35, 36
Article 36a, 10 U.S.C. §836a	64
Article 38, 10 U.S.C. §838	71
Article 39, 10 U.S.C. §839	7
Article 76, 10 U.S.C. §876	*passim*
Article 81, 10 U.S.C. §881	3, 7
Article 92, 10 U.S.C. §892	4
Article 134, 10 U.S.C. §934	*passim*
10 U.S.C. §8914	23
10 U.S.C. §8991	23
18 U.S.C. §793	2, 4, 60, 61
28 U.S.C. §1252	9, 20
28 U.S.C. §1253	20
28 U.S.C. §1292	18
28 U.S.C. §1331	21, 22
28 U.S.C. §1343	46
28 U.S.C. §1361	22
28 U.S.C. §1653	22
28 U.S.C. §2201	22
28 U.S.C. §2202	22
28 U.S.C. §2281	19

Page

28 U.S.C. § 2282 . . . . . 15, 18, 19

28 U.S.C. § 2283 46

42 U.S.C. § 1983 46

50 U.S.C. App. § 783(b) 3-4

62 Stat. 637 30

Pub. L. 90-207, 81 Stat. 654 23

Miscellaneous:

Berger, *Congress v. The Supreme Court* (1969) 41

96 Congressional Record 1434-1441 36

96 Congressional Record 1414 36

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Executive Order No. 11638 (Dec. 22, 1971), 36 F.R. 24913 23

Executive Order No. 11740 (Oct. 3, 1973), 38 F.R. 27585 23

Federal Rules of Civil Procedure
Rule 8 22
Rule 15 22

Federal Rules of Criminal Procedure, Rule 16 64

Hart, *The Power of Congress to Limit The Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953) 38

Hart and Wechsler, *The Federal Courts and the Federal System* (2d Ed. 1973) . . . 38, 39, 41, 42, 43, 44, 48

Page

Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2575, 80th Cong. 1st Sess. (1947) 31

Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong. 1st Sess. (1949) 34

House of Representatives Report No. 1034, 80th Cong. 1st Sess. (1947) 32, 33

Jaffee, *Judicial Review: Questions of Law*, 69 Harv.L. Rev. 239 (1955) 38

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Para. 151(a) 57
Para. 53e 57

Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn.L. Rev. 53 (1962) 41

New York American (Aug. 3, 1821) 43

Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380 (1966) 69

Note, *Civilian Court Review of Court-Martial Adjudications*, 69 Col.L.Rev. 1259 (1969) 28

Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv.L.Rev. 299 (1963) 20

Notes of the Advisory Committee on the Federal Rules of Civil Procedure, Rule 16 64

Page

Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U.Pa.L. Rev. 157 (1970) 41

Reznick, *The New Federal Rules of Criminal Procedure*, 54 Geo.L.J. 1276 (1966) 64

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IN THE

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OCTOBER TERM, 1974

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

Appellants,

v.

RAYMOND G. DeCHAMPLAIN,

Appellee.

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Does this Court have jurisdiction over a direct appeal from a decision by a single district judge enjoining the enforcement of an Act of Congress, where the district judge proceeded on the basis of a then-controlling but since reversed decision of the Court of Appeals?

2. Does a United States District Court have jurisdiction to review collaterally, other than by *habeas*

corpus, determinations of constitutional law and individual rights made by a military court-martial?

3. May a United States District Court enjoin a pending court-martial where clear and substantial violations of a serviceman's constitutional rights will occur if the court-martial is allowed to take place, no material facts are in dispute, no interpretation of specialized military law is necessary, and there is little likelihood that the rights asserted can be vindicated in military courts?

4. Did the district court act within its discretion in enjoining the appellee's scheduled court-martial until he and his chief defense counsel are given full access to the evidence upon which the charges are based?

5. In a criminal prosecution brought pursuant to 18 U.S.C. §793, must the government provide the defendant and his chief defense counsel with unlimited access to and use of relevant evidence, subject to a protective order against disclosure to those not involved in the defense of the case?

STATEMENT OF THE CASE

DeChamplain brought this action to enjoin the defendants from subjecting him to a court-martial under conditions imposing unmistakable and unconscionable interferences with his Fifth and Sixth Amendment rights to due process of law, a fair trial, and the effective assistance of counsel. The jurisdiction of the federal courts was invoked prior to trial because the violations of DeChamplain's constitutional rights were

clear and substantial; because the military courts denied relief and indicated that they would continue to do so; because no material facts were in dispute and the issues were of pure constitutional law; and because DeChamplain would suffer permanent and irreparable harm if he were required to submit to the court-martial and exhaust all appeals within the military justice system before gaining a federal civilian court forum to redeem his rights.

FACTS[1]

DeChamplain is a Master Sergeant in the United States Air Force. He served in the Air Force for over twenty years with an officially recorded outstanding record of service. His enlistment expired on June 10, 1973. Since that date he has been retained in the service on non-pay status pending final determination of the charges against him.

DeChamplain was arrested by the Air Force on July 2, 1971, and has been kept in confinement ever since that date. In November, 1971, he was tried by general court-martial and convicted on charges alleging three offenses: (1) Violating Article 81 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 881, by conspiring to communicate classified information to an agent of a foreign government, in violation of Article 134, U.C.M.J., 10 U.S.C. §934, and 50 U.S.C. App.

[1]The Court is respectfully referred to the district court's findings of facts, reprinted in the Jurisdictional Statement (J.S.) at 23-28.

§ 783(b)[2]; (2) violating Article 92, U.C.M.J., 10 U.S.C. § 892, by failing to obey an Air Force regulation; and (3) violating Article 134 by allegedly copying and attempting to deliver classified documents affecting national defense to unauthorized persons, in violation of the espionage laws of the United States, 18 U.S.C. § 793.

The conviction was reversed by the Air Force Court of Military Review on October 5, 1972, on the ground that it was based upon a coerced and unlawful confession. *United States v. DeChamplain*, ACM 21034, 46 C.M.R. 784. The government appealed to the Court of Military Appeals, which affirmed on February 16, 1973, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

Over three months later, on May 30, 1973, the same charges, with certain minor modifications to reflect the suppression of the coerced statement, were approved for a rehearing by a general court-martial (App. 8, 20-22).[3]

On July 5, 1973, DeChamplain retained Leonard B. Boudin as chief defense counsel because of his experience and expertise in similar litigation involving charges of violations of the espionage laws (App. 10, 36). On the following day and repeatedly thereafter, DeChamplain requested, through counsel, that the entire record of the prior trial and the charges and documents upon which the prosecution was based be

[2] The third clause of Article 134 assimilates into the Code all federal civilian crimes committed by a serviceman, subject to the "service-connected" limitations of *O'Callahan v. Parker*, 395 U.S. 258.

[3] References to "App. " are to pages in the Appendix.

delivered to chief defense counsel for examination, study, and preparation for trial (App. 10). It was contemplated that counsel would study the documents together with his partners and associates and with expert consultants, some of whom would be witnesses for the defense at trial (App. 36-39, 56-58).

The government refused to make any of the "classified" portions of the prior trial record or the documents available to DeChamplain's civilian counsel from July to September 1973, and stated that counsel would have to be "cleared" by the Air Force and by other agencies of the federal government. Appellee sought relief from the military judge, Colonel Russell A. Stanley, who refused to order that the documents or prior record be disclosed at that time (App. 11, 56). Appellee then petitioned the Court of Military Appeals, which also denied relief on September 5, 1973. *Dechamplain v. McLucas*, 22 U.S.C.M.A. 462, 47 C.M.R. 552.

On September 20, the government announced a final decision on access. Chief defense counsel would be absolutely barred from access to fifteen documents which had been introduced at DeChamplain's first court-martial, as well as all references to those documents in the record of that trial. The government sought to avoid the defense's objections by unilaterally dropping the specifications relating to the fifteen documents. (App. 11, 20-22, 25-27).[4]

Chief defense counsel also was not to be permitted to receive copies of the nine documents (or the

[4] The revised charge sheet shows the dropped specifications, which the government crossed out by hand (App. 20-22).

references to them in the prior record of trial) upon which the remaining outstanding charges were based. He was to be allowed, however, to look at the documents under severe restrictions. He could examine the documents and discuss their contents only in the presence of officials holding appropriate security clearances, and only at a time and place chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured."

No other members of the civilian defense team, including associate attorneys, expert consultants, and potential expert witnesses could observe the documents or even receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary. Finally, chief counsel could not discuss any aspects of the documents with that associate or with military counsel in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances.[5] Nor could DeChamplain retain his classified notes for delivery to his civilian

[5]Subsequent to the district court's decision herein, the government amended its restrictions to allow limited access to one foreign policy and one classification expert (J.S. at 32-33). These two experts were subject to the same restrictions as to right to retain documents, to take notes from them, or even to discuss their contents with defense counsel.

counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record (App. 11, 25-27).

The military judge approved the terms of the government's restrictions upon access without modification by order dated October 13, 1973 (App. 62).

DeChamplain also raised several other issues before the military judge in pre-trial sessions, pursuant to Article 39, U.C.M.J., 10 U.S.C. §839. Among these were motions (1) to dismiss the Article 81 and Article 134 charges on the grounds that Article 134 had been declared unconstitutional by the Courts of Appeals for the Third and District of Columbia Circuits;[6] (2) to require an open and public trial, contrary to the practice at DeChampain's first court-martial, where the trial had been closed when "classified" information was introduced or discussed; and (3) to allow DeChamplain's military counsel to appear in federal court, if necessary, to seek appropriate relief. These motions were denied (App. 9, 14, 16). The petition to the Court of Military Appeals for extraordinary relief also raised these issues; the Court denied relief with respect to them as well. *DeChamplain v. McLucas, supra.*

DeChamplain's court-martial was scheduled to begin on November 15, 1973.

Proceedings Below:

DeChamplain brought suit in the United States District Court for the District of Columbia. He sought

[6]The Article 81 charge alleged a conspiracy to violate Article 134.

an injunction on four causes of action: (1) prohibiting the court-martial from going forward until he and his chosen counsel were granted unlimited access to the documents and the record of the prior trial, subject only to a protective order against disclosure to third parties not involved in the defense of the case; (2) prohibiting trial on the Article 134 charges; (3) enjoining the military court from closing the trial to the public and the press; and (4) requiring the government to permit DeChamplain's military defense counsel to appear in federal court in defense of their client.

Relief on the Article 134 question was sought on the basis of the then-controlling decisions of the United States Court of Appeals for the District of Columbia holding Article 134 to be unconstitutional, *Avrech v. Sec'y. of the Navy*, 477 F.2d 1237 (1973); *Hooper v. Laird*, 482 F.2d 784 (1973), and upon the similar decision of the Third Circuit Court of Appeals in *Levy v. Parker*, 478 F.2d 772 (1973).[7] Accordingly, a three-judge court was not requested because the question of Article 134's constitutionality did not seem to be "substantial," at least to the district court which was bound by the holdings of the court of appeals.

The district court granted relief on the "access" and "Article 134" causes of action; it did not reach the "public trial" and "military counsel" questions. It held that the access limitations would "effectively handcuff . . . retained civilian counsel" and that "[t]he Air Force has not come forward with any convincing

[7] This Court subsequently reversed the decisions in *Avrech* and *Levy*. *Secretary of the Navy v. Avrech*, ____ U.S. ____, 94 S.Ct. 3039 (1974); *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974).

justification, military or otherwise, for the imposition of these limitations" (J.S. at 22). It found that it should not abstain from deciding the issues prior to trial because:

> "The circumstances surrounding this case are such that unless this Court takes affirmative action, Sergeant DeChamplain will be denied fundamental constitutional guarantees.
>
> The matters raised in this litigation do not necessitate determinations which the military forum is best equipped to make. The issues are purely legal: whether the military has jurisdiction to try plaintiff for violations of a statute which stands unconstitutional under circumstances and conditions which may unduly impede his preparation and presentation of a sound defense. No compelling justifications have been presented which require this Court to defer considerations of these matters to the military" (J.S. at 19-20).

The government appealed directly to this Court, pursuant to 28 U.S.C. §1252, and, as a protective measure, to the United States Court of Appeals for the District of Columbia Circuit (App. 75). The Court of Appeals extended the government's time to docket the appeal until 15 days after the date of this Court's final decision in this matter (App. 76-77).

Appellee moved to dismiss the appeal in this Court on the grounds that the Court does not have appellate jurisdiction over an order issued by a single district judge enjoining the enforcement of an Act of Congress. On June 24, 1974, the Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits (App. 78).

At the end of its last Term, the Court held that Article 134 is constitutional, reversing the decisions of the Third Circuit and District of Columbia Courts of Appeals. *Parker v. Levy, supra; Secretary of the Navy v. Avrech, supra.* Accordingly, appellee concedes that that part of the district court's order enjoining prosecution on the Article 134 charges was in error. We therefore do not address the Article 134 question in this Brief, except in dealing with the question of the Court's jurisdiction over the appeal (Point I, *infra*).

SUMMARY OF ARGUMENT

I.

The Court lacks jurisdiction over the appeal because the single district judge did not have jurisdiction to enter an order restraining the enforcement of Article 134, U.C.M.J., 10 U.S.C. §934, an Act of Congress. Rather, the district judge should have convened a three-judge court to hear and decide that issue. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713. It has long been the rule that this Court may not review injunctions entered by a single judge that required the consideration of a three-judge court. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10. The government's remedy is to the Court of Appeals. *Hicks v. Pleasure House, Inc.*, 404 U.S. 1.

The single district judge properly did not refer the "access to evidence" cause of action to a three-judge court, however, since it did not involve an Act of Congress. For this very reason, the Court does not have

direct appellate jurisdiction over that issue. Again, the government must appeal to the Court of Appeals.

II.

A federal district court has jurisdiction to exercise collateral review other than by habeas corpus over determinations of constitutional law affecting individual rights made by a military court. If this were not so, many servicemen convicted by courts-martial would never be able to raise their constitutional claims and defenses in a federal court; this would violate the strong policy in favor of judicial review. *Fay v. Noia*, 372 U.S. 391, 424.

Moreover, there is a long history in this Court supporting various forms of collateral attack upon court-martial determinations. *Gusik v. Schilder*, 340 U.S. 128, 133 n.3. And Congress, in enacting Article 76 of the Uniform Code and its immediate predecessors in the Articles of War, did not intend to change the historical practice with respect to collateral review. Rather, Congress intended only to make explicit the termination point for judicial proceedings within the military itself.

Finally, if Article 76 were interpreted to bar collateral review other than by habeas corpus, it would unconstitutionally deprive many servicemen of due process of law and of the right to present their constitutional defenses to an Article III court. *Crowell v. Benson*, 285 U.S. 22; *St. Joseph Stock Yards v. United States*, 298 U.S. 38.

III.

A federal district court may enjoin a court-martial when the military acts to deprive the accused of substantial constitutional rights going to the integrity of the trial process itself, where there is little likelihood that the rights asserted will be favorably viewed by the military courts, where no relevant facts are disputed, and where interpretation of specialized military law is not necessary.

There is no rigid rule against such equitable intervention. No statute or constitutional provision prohibits it. And the comity doctrine, which limits but does not prohibit federal court interference with state criminal trials, does not apply to military trials with equal force. There is a revered historical and judicial tradition of deference to the "independent sovereignties" of the states; the tradition with respect to the military is quite the opposite. *Reid v. Covert*, 354 U.S. 1; *O'Callahan v. Parker*, 395 U.S. 258. Moreover, state courts have a long common-law experience, deal with the full range of judicial problems, and are primarily charged with the protection of constitutional rights. The primary purpose of the military, on the other hand, is to prepare for and to fight wars; military courts have shown less solicitude than civil courts for the niceties of constitutional law and individual rights. Thus, there is much less reason for federal courts to abstain from interference with court-martial proceedings. Where the violations of constitutional rights are clear and fundamental, a federal court may intervene.

IV.

Here the district court acted well within the limits of its discretionary power in issuing a preliminary injunction on the "access to evidence" cause of action, even if those limits are measured by the strict comity doctrine urged by the government. The question involved was one of pure constitutional law affecting the legitimacy of the trial process itself. There were no disputed material facts nor were there problems of interpretation and application of specialized military law. There was a strong likelihood that the constitutional issues would not receive favorable consideration in the military; indeed, appellee had raised the issues unsuccessfully before the military courts, including the Court of Military Appeals. And, there was little question that, on the merits, appellee was correct in his constitutional claim.

Finally, there was a strong probability of irreparable harm if the district court did not intervene when it did. DeChamplain had been in confinement for over two years. He had undergone one trial which was tainted by government misconduct. If he had been forced to go to trial under the conditions the government sought to impose, his chances of acquittal would have been minimal. He would have had to wait until he exhausted his military remedies and sought habeas corpus, if available, in a federal court before his constitutional rights would have been vindicated, during which time he would have remained in confinement. And, finally, he then would have had to undergo a *third* court-martial at which he would be afforded the rights to which he was entitled. Thus, it can in no sense be

said that DeChamplain could protect his rights through the normal course of a "single criminal prosecution." *Cf., Younger v. Harris*, 401 U.S. 37, 46.

V.

The government must disclose all relevant evidence to a criminal defendant and his attorneys or it must forego prosecution. This is so even where the evidence involves so-called "state secrets" or "national security" information. The government, of course, ordinarily may protect its secrets in the legitimate exercise of its power to protect the national defense and provide for the common welfare. But once the government invokes the jurisdiction of the courts for the purpose of imposing criminal sanctions, it no longer may withhold those secrets if they constitute relevant evidence to the defense of the charges. *United States v. Reynolds*, 345 U.S. 1, 12; *Alderman v. United States*, 394 U.S. 165, 181.

Here, the documents at issue are more than merely "relevant" evidence; they are the very basis and foundation of the prosecution itself. And under the espionage charges brought, the defendant has the right to present defenses that the documents do not affect the defense or security interests of the United States, or that they were in the "public domain" prior to the defendant's alleged acts of disclosure to unauthorized agents. *Gorin v. United States*, 312 U.S. 19; *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945). Thus, defendants charged with espionage must be given the opportunity to examine closely the information al-

legedly wrongly disclosed so that all avenues of proper defense may be investigated and pursued; this is the universal practice in federal court espionage cases. The restrictions imposed upon DeChamplain and his chief counsel effectively denied the opportunity to present these defenses and denied DeChamplain's right to be represented by counsel of his choice. They fundamentally affected the integrity of the entire trial process; under the circumstances a fair trial in accordance with due process of law was impossible.

ARGUMENT

POINT I.

THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION

This appeal arises in an unusual context presenting difficult problems as to the appellate jurisdiction of this Court. We have been unable to find a single case in which similar problems were presented.

The complaint herein sought an injunction against the enforcement of Article 134, U.C.M.J., an Act of Congress. Ordinarily, a prayer for such relief cannot be considered by a single district judge but must be referred to a three-judge court, 28 U.S.C. §2282; the only exception is where the constitutional question raised is insubstantial. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713. At the time the complaint was filed, however, it was the settled law

within the District of Columbia Circuit that Article 134 was unconstitutional. *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Hooper v. Laird*, 482 F.2d 784 (D.C. Cir. 1973). The District Court for the District of Columbia, whether constituted as a single-judge court or as a three-judge court, clearly was bound by those decisions at that time. It therefore did not seem necessary to convene a three-judge court on the Article 134 question.[8]

After the government appealed to this Court and appellee had moved to dismiss, the Court reversed the decisions of the Third Circuit and District of Columbia Court of Appeals and held that Article 134 was constitutional. *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974); *Secretary of the Navy v. Avrech*, ____ U.S. ____, 94 S.Ct. 3039 (1974). Those decisions suggest that the single district judge here did not have jurisdiction to enter an injunction against the enforcement of Article 134 because the question of the statute's constitutionality was indeed substantial and a three-judge court was required.[9]

[8] It was not necessary to convene a three-judge court on the access-to-documents or other issues because they did not involve an Act of Congress. This was so even if a three-judge court was required on the Article 134 question. See Motion to Dismiss at 7-8.

[9] The government argues that even if the question of the constitutionality *vel non* of the first two clauses of Article 134 was substantial, the question raised here was not substantial because DeChamplain was charged pursuant to the third clause of that Article (Govt. Brief at 18-19). But we have shown that there is at least a substantial question whether Article 134 is divisible into three separate statutes, and, in any event, that a serviceman charged under the third clause is subject to conviction under either of the first two clauses. See Motion to Dismiss at 3-5.

Accordingly, this Court may not review on direct appeal the injunction erroneously entered by the single district judge on the Article 134 issue. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 15-16; *Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 3. See Motion to Dismiss at 5-8. Rather, the government must seek relief in the Court of Appeals, which assuredly would vacate that part of the district court's order enjoining enforcement of Article 134. *Idlewild Bon Voyage Liquor Corp. v. Epstein; supra; Hicks v. Pleasure House, Inc., supra; Schackman v. Arnebergh*, 387 U.S. 427; *Buchanan v. Rhodes*, 385 U.S. 3; Wright, *Law of Federal Courts* (2d Ed. 1970) § 59, p.193.[10] The Court of Appeals could then consider *on its merits* the second branch of the district court's order dealing with access to documents and evidence,[11] over which it would have

[10]The government misstates the law in arguing that the proper remedy is for this Court to vacate and remand (Govt. Brief at 17, n.9). That remedy once was proper because there was no remedy in the Court of Appeals. *Stratton v. Southwestern Ry. Co., supra*, 282 U.S. at 16. The *Idlewild* case and its progeny, cited in the text above, changed the rule so as to provide a remedy in the Courts of Appeals and thereby make unnecessary and unavailable any relief in this Court. The government's reliance on *Flemming v. Nestor*, 363 U.S. 603, 607, and *Federal Housing Administration v. The Darlington*, 352 U.S. 977, is misplaced. Those cases merely reflect the old *Stratton* rule; they were decided well before *Idlewild* and the cases it spawned abandoned that rule.

[11]The single district judge exercised proper jurisdiction over the "access" cause of action irrespective of its jurisdiction *vel non* over the Article 134 cause of action because it was an independent claim not relating to the validity or interpretations of Article 134 or any other Act of Congress. *Landry v. Daley*, 280 F.Supp. 929, 937-938 (N.D.Ill. 1967), 288 F.Supp. 194, 197-199 (N.D.Ill. 1968); *Hobson v. Hansen*, 256 F.Supp. 18 (D.D.C. 1966);

the usual appellate jurisdiction pursuant to 28 U.S.C. §1292.[12]

The government argues that a three-judge court was not required because an injunction against the enforcement of Article 134 was sought only for this case, and not to restrain the operation of the "entire regulatory scheme," citing *Flemming v. Nestor*, 363 U.S. 603 and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (Govt. Brief at 17-18). But 28 U.S.C. § 2282 mandates a three-judge court whenever an application is made to restrain "the enforcement, operation, *or* execution of any Act of Congress for repugnance to the Constitution of the United States;" clearly an order enjoining the appellee's court-martial on the grounds that Article 134 was unconstitutional comes within the statute's scope. The citations to the *Flemming* and *Kennedy* cases are inapposite; in those cases only declaratory judgments were sought, and the Court expressly relied on the important differences between a declaratory judgment and an injunction. See *Kennedy v. Mendoza-Martinez*,

Jehovah's Witnesses in State of Wash. v. King County Hosp., 278 F.Supp. 488, 496-497 n.6 (W.D.Wash. 1967), aff'd. 390 U.S. 598 (1968); *ABC Books, Inc. v. Benson*, 315 F.Supp. 695, 703 (M.D.Tenn. 1970); *Ascheim v. Quinlan*, 314 F.Supp. 685 (M.D.Pa. 1970); *Tillman v. Dade County School Board*, 327 F.Supp. 927, 930 (S.D.Fla. 1971); Wright, *Law of Federal Courts, supra* at 191. Indeed, a three-judge court probably would lack jurisdiction to decide such joined claims. See *Pittsburgh & W.V. Ry. Co. v. United States*, 281 U.S. 479, 488 (1930); *New York Central Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Powell v. United States*, 300 U.S. 276, 289-290 (1937); Wright, *Law of Federal Courts, supra* at 191.

[12]There is of course no provision for a direct appeal to this Court of the district court's order on the access question, standing alone.

supra, 372 U.S. at 152-155; *Flemming v. Nestor*, *supra*, 363 U.S. at 607.[13]

The position urged here by the government would render §§2282 and 2281 inapplicable in every case where an injunction is sought or obtained except where relief is sought in the nature of a broad class action. That view is contrary to the history and intent of the three-judge court statutes. Indeed, the Court recently reaffirmed that "A three-judge court is required even if the constitutional attack – as here – is upon the statute *as applied*." *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (emphasis added).[14] That rule is dispositive here, where an injunction was sought on the basis that the statute was unconstitutional on its face and as applied.

The government's further argument that a three-judge court was not required because the single judge could and should have dismissed the case on the "threshold" question of whether the district court should enjoin a pending court-martial, *Younger v. Harris*, 401 U.S. 37 (Govt. Brief at 12), is also precluded by *Steffel*. There the Court noted that a three-judge court "is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of dis-

[13]Compare *Rusk v. Cort*, 372 U.S. 144, decided together with *Kennedy v. Mendoza-Martinez*, *supra*, where an injunction was sought and a three-judge court was convened. 372 U.S. at 152. See *Cort v. Herter*, 187 F.Supp. 683 (D.D.C. 1960).

[14]See also *Department of Employment v. United States*, 385 U.S. 355, 357; *Query v. United States*; 316 U.S. 486, 490; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 37-50 (1964).

cretion will usually be necessary." 415 U.S. at 457, n.7.[15]

Finally, the government seems to suggest that the Court may review the district court order under 28 U.S.C. §1252 even though it is barred from review under 28 U.S.C. §1253 (Govt. Brief at 16). But this position would allow direct appeal to this Court by the government whenever an injunction is granted by a single judge acting without jurisdiction. That would be in clear derogation of the holding of this Court that:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court . . . ." *Stratton v. St. Louis S.W. Ry. Co., supra*, 282 U.S. at 15-16.

Read in this light, the clear meaning of section 1252 is that appeal lies directly to the Supreme Court from a district court order entered *within* its jurisdiction;[16] when the district court acts without jurisdiction, appeal is properly taken only to the Court of Appeals.

When viewed from a broader perspective, the course of action urged here makes good sense. The only possible reason for bringing this case directly to the Court is that the district court enjoined the enforcement of Article 134. But in the light of the Court's decisions in *Parker v. Levy, supra*, and *Secretary of the*

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[15]See also *Jones v. Wade*, 479 F.2d 1176, 1180 (5th Cir. 1973); *Abele v. Markle*, 452 F.2d 1121, 1125 (2nd Cir. 1971); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 309 (1963).

[16]*E.g.*, declaring an Act of Congress to be unconstitutional without enjoining its enforcement. See *Kennedy v. Mendoza-Martinez, supra*.

Navy v. Avrech, supra, appellee concedes that that portion of the district court's decision is in error. Accordingly, there is no need for the Court to exercise the extraordinary procedure of direct review of the district court's decision. The Court of Appeals can expeditiously correct the district court's error *vis-a-vis* Article 134. It can then consider the remaining issues raised by the government's appeal in normal course.

On the other hand, if the Court does not believe that the opinion of the District of Columbia Circuit Court of Appeals would be helpful in its ultimate determination of the case, then in the interests of judicial economy, it should treat the government's appeal as a petition for certiorari, grant certiorari, and decide the case on the merits.

POINT II.

A UNITED STATES DISTRICT COURT HAS JURISDICTION TO REVIEW COLLATERALLY, OTHER THAN BY HABEAS CORPUS, DETERMINATIONS BY A MILITARY COURT-MARTIAL OF CONSTITUTIONAL LAW AND INDIVIDUAL RIGHTS.

DeChamplain invoked the jurisdiction of the district court pursuant to 28 U.S.C. §1331 — the federal question statute.[17] He raised substantial questions

[17]Section 1331(a) provides that:

"the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

involving Fifth and Sixth Amendment rights to due process, a fair trial, and effective assistance of counsel. Accordingly, the district court had jurisdiction to entertain the action unless some other statute created an exception to section 1331 and barred jurisdiction.[18]

[18]The government argues here, for the first time, that there is no federal question jurisdiction because DeChamplain did not allege the jurisdictional amount in his complaint (Govt. Brief at 30-31). But DeChamplain alleged that the case "arises under the Fifth and Sixth Amendments to the Constitution . . . [and that t]he Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201 and 2202 . . . ." By alleging § 1331 jurisdiction, DeChamplain, of course, alleged by necessary implication all the requisites of that jurisdiction; the form used is consistent with the injunction of Rule 8(e)(1), Federal Rules of Civil Procedure that "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Indeed, the government's attempt to raise the pleading issue at this time is cynical at best. Surely, had the issue been raised in the district court and had that court considered the pleading as to jurisdiction to be defective, an amendment in due course would have been permitted under Rule 15 of the Federal Rules of Civil Procedure. See also F.R. Civ. P. 8f ("All pleadings shall be so construed as to do substantial justice"). Indeed, amendment to correct technical defects in allegations of jurisdiction is specifically provided for, both in the trial and the appellate courts, 28 U.S.C. §1653. Accordingly, even if the Court finds that the allegation of §1331 jurisdiction in the complaint was not complete, it should deem the complaint amended under §1653 to correct the defect. See, *e.g.*, *Willingham v. Morgan*, 395 U.S. 402, 407 n.3; *Buell v. Sears, Roebuck and Co.*, 321 F.2d 468, 471 (10th Cir. 1963); *Firemen's Ins. Co. v. Robbins Coal Co.*, 288 F.2d 349 (5th Cir. 1961), *cert. den.* 368 U.S. 875; *Fry v. Lavne-Western Co.*, 282 F.2d 97, 99 (8th Cir. 1960).

As a factual matter, there can be no doubt that the amount in controversy is greatly in excess of $10,000.00 in value, exclusive of interest and costs. See *Schroth v. Warner*, 353 F.Supp. 1032, 1036 and n.9 (D. Hawaii 1973). At his first court-martial, DeChamplain

The government argues that Article 76, U.C.M.J., 10 U.S.C. §876,[19] creates just such an exception, and that

was sentenced to fifteen years at hard labor, dishonorable discharge, lost of accrued pay and allowances, and reduction to the lowest enlisted grade; he faced a similar sentence at a second court-martial. The loss of liberty for fifteen years is of itself worth well over the jurisdictional amount in value. Moreover, during such a period of incarceration DeChamplain would not be free to earn a livelihood, either in the military or as a civilian. As a Master Sergeant, DeChamplain qualifies at the E-7 pay grade. With over twenty years of military experience, he was paid at the rate of $652.80 per month at the time of his arrest; at the time of the district court's action in this case he qualified for pay at the rate of $792.90 per month. See Executive Order No. 11638 (Dec. 22, 1971), 36 F.R. 24913 and Executive Order No. 11740 (Oct. 3, 1973), 38 F.R. 27585. With normal increases for seniority and upward adjustments in accordance with the general schedule of compensation for federal classified employees, pursuant to Section 8 of Pub. L. 90-207, 81 Stat. 654 (1967), DeChamplain would receive, at a minimum, over $150,000 in basic pay alone for his next fifteen years of Air Force service. He would not receive any part of that sum, of course, if he were convicted on the pending charges.

If, on the other hand, DeChamplain were to choose to retire from the military, he not only would be free (but for possible conviction on the pending charges) to seek civilian employment, but he would be entitled to a lifetime pension at fifty percent of the rate of the baisc pay applicable on the date of his retirement, or nearly $400 per month for the rest of his life. See 10 U.S.C. §§8914, 8991(B). These retirement rights, too, would be lost by a conviction on the pending charges.

Finally, if convicted, DeChamplain would lose accrued pay from the date of the expiration of his enlistment (June 10, 1973) until the date of his conviction and final approval of his sentence. At the present time this would amount to at least seventeen months pay, worth, at the present rate of compensation, $13,479.30.

[19]Article 76 provides:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-

the only method by which the federal courts may review military court rulings is by a writ for habeas corpus[20] (Govt. Brief at 23-25, and Govt. Supp. Brief in *Secretary of the Navy v. Avrech*, No. 72-1713, hereinafter "*Avrech* Brief," on which it relies here).

The question of the district court's jurisdiction *vel non* must be considered separately from the question of the propriety of an injunction prior to a pending court-martial. The first issue is narrow: Has Congress precluded the federal courts from collaterally reviewing decisions of military courts-martial in any form other than habeas corpus? The second question goes to when and under what circumstances such jurisdiction, if it exists, should be exercised.

The jurisdictional issue, though narrower in focus, has broad consequences going well beyond the circumstances of this case. Those consequences cannot be ignored simply because they may not be presented in their starkest form here. For if Article 76 bars jurisdiction over this case, it just as surely bars federal court collateral review over final court-martial *convictions* where the habeas corpus remedy is unavailable.

> martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President."

[20]The government did not so argue in the district court.

Such an interpretation of Article 76 unavoidably raises the problem of its constitutionality. See *infra*, pp. 41-50.

Accordingly, the Court first should consider and decide the Article 76 jurisdictional issue in terms of its broadest implications for all cases. The question of under what circumstances a federal court may intervene prior to a court-martial is not a genuine "jurisdictional" issue, but a problem of judicial discretion, and should be treated separately. See Point III, *infra*. We treat here, then, of the jurisdictional issue.

It is settled that Article 76 does not bar collateral review of a court-martial conviction in a civilian court. *Burns v. Wilson*, 346 U.S. 137; *Gusik v. Schilder*, 340 U.S. 128; the sole question is whether the form of review is restricted to a habeas corpus action or whether other forms of review should be allowed. Policy, logic, precedent, the language and legislative history of Article 76, and the Constitution itself mandate that habeas corpus should not be the only method of bringing a collateral attack of court-martial determinations.

A. There Is A Strong Policy That Constitutional Rights Shall Not Be Denied Without An Opportunity For Judicial Review In A Federal Court.

The sentences imposed by most courts-martial make it inevitable that in the vast majority of cases a serviceman is not in custody by the time he has

exhausted his military remedies.[21] A holding that habeas corpus is the only method by which a serviceman may secure judicial review would mean, in effect, that most servicemen would never be able to obtain review in a federal court of their convictions or of the constitutional issues which may be raised by the record. Such a holding would "defeat the manifest federal policy that federal constitutional rights of personal liberty[22] shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. 391, 424. *Cf., Sibron v. New*

[21]For example, in *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.* 396 U.S. 1013, it took two years for the serviceman to exhaust his military remedies, by which time he was no longer in confinement. In *Secretary of the Navy v. Avrech, supra*, the serviceman was not sentenced to any confinement but nevertheless suffered the ususal "adverse collateral legal consequences" which flow from a criminal conviction. *Cf., Sibron v. New York*, 392 U.S. 40 at 55. Indeed, in the instant case, DeChamplain already has been confined for over three years, both prior and subsequent to his original conviction and its reversal by the Air Force Court of Review. If DeChamplain were to be retried and convicted, there is a substantial possibility that, with credit for time-served prior to such conviction, he would no longer be in confinement by the time he will have exhausted his military remedies.

[22]There can be no doubt that a court-martial conviction, even where *no* confinement is imposed, affects a serviceman's "good name, reputation, honor [and] integrity," *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Board of Regents v. Roth*, 408 U.S. 564, 573-574, and that an unlawful conviction therefore deprives him of a "liberty" right. See *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C.Cir. 1966), *cert. den.* 385 U.S. 881; *Kauffman v. Sec'y. of the Air Force, supra*, 415 F.2d at 995.

York, 392 U.S. 40. As was succinctly stated by the Court of Appeals for the District of Columbia Circuit in *Gallagher v. Quinn*, 363 F.2d 301 (1966), *cert. den.* 385 U.S. 881:

> "The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal." *Id.* at 304.[23]

In a similar vein the Court of Claims in *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *rev'd. on other grounds*, 393 U.S. 348 held:

> "There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from 'finality' to that specific proceeding. Liberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement – the consequence of saying that habeas corpus is the only remedy – would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like

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[23]This Court has noted the lack of expertise of military tribunals in dealing with constitutional questions. *O'Callahan v. Parker*, 395 U.S. 258, 265; *Noyd v. Bond*, 395 U.S. 693, 696, n.8.

plaintiff who have not been sentenced to jail or who have been released." *Id.* at 592.[24]

B. Judicial Precedent Supports Collateral Review Of Court-Martial Determinations Other Than By Habeas Corpus.

This Court traditionally has entertained collateral attacks on courts-martial in a variety of forms of action not restricted to habeas corpus. See *Wise v. Withers*, 3 Cranch 331 (action in trespass); *Houston v. Moore*, 5 Wheat. 1 (action in replevin); *Dynes v. Hoover*, 20 How. 65 (action for assault, battery and false imprisonment); *Smith v. Whitney*, 116 U.S. 167 (writ of prohibition); *Runkle v. United States*, 122 U.S. 543 (action for back pay); *Swaim v. United States*, 165 U.S. 553 (action for back pay). Indeed, the Court's sanction of the use of such collateral remedies predated its approval in *Ex Parte Reed*, 100 U.S. 113, of resort to habeas corpus.[25]

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[24] *Accord, United States v. Frischolz*, 16 USCMA 150, 36 CMR 306 (1966); *Kauffman v. Secretary of the Air Force, supra; Homey v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971); *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968), *cert. den.* 394 U.S. 934; *Melvin v. Laird*, 365 F.Supp. 511 (E.D.N.Y. 1973). Many commentators agree. See, *e.g.*, Weckstein, *Federal Court Review of Courts-Martial Proceedings*, 54 Mil. L. Rev. 1, 27 (1971); Slattery, *Federal Court Review of Decisions of Military Tribunals*, 40 U. Cin. L. Rev. 569 (1971); Note, *Civilian Court Review of Court Martial Adjudications*, 69 Col. L. Rev. 1259, 1273-1279 (1969).

[25] A careful and scholarly review of the early cases in this Court may be found in the exhaustive opinion in *Brown v. United States*, 365 F.Supp. 328 (E.D.Pa. 1973).

In *Gusik v. Schilder, supra,* the Court considered the effect upon the above cases of the finality provisions of the then-recently enacted Article 53 of the Articles of War.[26] The Court held that Congress did not intend to break the historical practice of collateral review and that habeas corpus therefore was ultimately available to Gusik. The Court noted the continuing validity of the cases allowing collateral attack other than by habeas corpus. 340 U.S. at 133, n.3.

C. Article 76 Was Not Intended To Alter The Historical Availability Of Collateral Review Of Court-Martial Proceedings By Means Other Than Habeas Corpus.

The language and legislative history of Article 76 demonstrates that it was not intended to change the law with respect to the availability of various forms of collateral attack in federal courts. We examine the statute in the light of the principle that there must be "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review," *Johnson v. Robison,* 415 U.S. 361, 373-374,[27] and in light of the Court's comment in *Gusik* that such a "break with history would have been

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[26]Article 53 was identical in terms to Article 76 of the U.C.M.J.

[27]See also *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141.

so marked that we believe the purpose would have been made plain and unmistakeable."[28] 340 U.S. at 133.

As an initial matter, the language of Article 76 does not explicity bar collateral review, and would not seem to do so by implication. *Cf., Johnson v. Robison, supra,* 415 U.S. at 367. The statute makes no reference at all to judicial review in the federal courts. The relevant language merely provides that the published orders and all proceedings of courts-martial "are binding upon all departments, courts, agencies, and officers of the United States . . . ," subject to two exceptional remedies within the military. Thus, the Court of Military Appeals has held that Article 76 merely "describes the normal terminal point for proceedings within the court-martial system" and consequently it "does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court [Court of Military Appeals]." *United States v. Frischolz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306, 307 (1966). *Accord, Gallagher v. Quinn,* 363 F.2d 301 (D.C. Cir. 1966), *cert. den.* 385 U.S. 881; *Augenblick v. United States,* 377 F.2d 586 (Ct.Cl. 1967), *rev'd. on other grounds,* 393 U.S. 348. The two exceptions in the statute

[28] The government admits that there is a long history of collateral review of military determinations other than by habeas corpus (*Avrech* Brief, p.5, n.7), but it argues that Congress intended to change this historic practice when it enacted the Uniform Code of Military Justice. Yet, the government fails to point to a single shred of evidence that Congress had such a purpose, let alone that it was "plain and unmistakeable." Indeed, we show in the text, *infra*, that Congress did not intend to affect federal court collateral review at all when it last amended the Articles of War in 1948 (62 Stat. 637) or when it replaced them with the U.C.M.J. in 1949.

reinforce that view; they relate solely to exceptions to finality within the military. There is absolutely no indication from the words of Article 76 that Congress addressed itself to collateral review at all, let alone that it meant to distinguish between habeas corpus and other forms of collateral attack.[29]

This view is consistent with a line of decisions in this Court that finality provisions in statutes normally apply only to the administrative proceedings provided for by the statute and not to the availability of judicial review. *Estep v. United States*, 327 U.S. 114 (Selective Service Act); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (Immigration and Nationality Act); *Brownell v. Tom We Shung*, 352 U.S. 180 (Immigration and Nationality Act); *Johnson v. Robison*, *supra* (Veterans Readjustment Act).

The history and context of Article 76 conclusively support this interpretation of its limited scope.

Until 1948, Articles 50 and 50½ of the Articles of War provided the method within the military by which court-martial adjudications were reviewed. Those articles did not contain a "finality" provision; nevertheless, it is apparent that there existed a well-established principle of finality *within* the system of military justice. That principle, however, was imprecise and uncertain. See, *e.g.*, *Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2575* (hereinafter "Hearings"), 80th Cong. 1st Sess., pp. 2118, 2070 (1947). Accordingly, the War Department

[29]Indeed, if Article 76 is viewed as barring other forms of collateral attack, then its language compels the conclusion that it bars habeas corpus review as well.

proposed several changes in Article 50 to remove the ambiguity by including a "finality" provision. No suggestion was made that the provision was to effect a change with respect to collateral review, which, as we have seen, was and historically had been available in a variety of forms. Rather the purpose was to clear up a perceived problem with respect to finality within the military. Thus in his letter of transmittal to the House Committee on Armed Services, Secretary of War Robert P. Patterson wrote:

> "Section 26 . . . amends the present provisions of Article 50½ to make explicit the finality of sentences of court-martial." H.R. Report No. 1034, 80th Cong. 1st Sess., p.12 (1947).

During the hearings before the House Subcommittee, General Hoover, Assistant Judge Advocate in the Department of the Army who explained the proposed amendments to the subcommittee, stated that the new Article 50 merely took the place of then-Article 50½ since the old Article was "somewhat unintelligible" and "an effort has been made to clarify it." *Hearings* at 2070. General Hoover further explained that:

> "The principle of [finality within the military justice system] is well established at present but the amendment is somewhat more definite than the present article." *Hearings* at 2118.[30]

[30]Indeed, in its brief in *Gusik v. Schilder, supra*, the government argued that in adopting the finality amendments in the form of Articles of War 50(h) and 53, "Congress simply made explicit what had been the practice throughout the years . . . ." Brief for the Respondent, October Term 1950, No. 110, pp. 13-14. This should be read in conjunction with the government's concession in its *Avtech* brief (p. 5, n.7) that the practice throughout the years had been to allow collateral review in a variety of forms.

The House Report which accompanied the bill stated with reference to Article 50:

> "5. A more adequate review should be provided.
>
> "Any system of judicial review is complicated, technical, and difficult to understand. The principal provisions of judicial review are presently contained in articles of war 50 and 50½. In an attempt to clarify these sections they have been rewritten by the War Department in section 26 of the bill. The new section provides for a new judicial council of three general officers, in addition to the present board of review, and defines the action to be taken upon cases examined. The section makes explicit the finality of sentences of court martial, and, for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism." *House Report 1034, supra* at 7.

Throughout the entire discussion of the various amendments relating to the review provisions, General Hoover never suggested that this provision eliminated, foreclosed, or had any reference at all to the question of review of court-martial convictions in the civilian courts.

The House passed the bill in 1947 but no comparable provision was enacted by the Senate. In 1948 the Senate enacted a Selective Service Act which contained, in Title II, the provisions of the 1947 House bill. The House version of the Selective Service Act did not contain any provisions relating to the Articles of War, but the Conference Committee of the House and Senate accepted the Senate bill. See generally, *U.S. Code and*

Congressional Service, 80th Cong. 2nd Sess., 1989-2018 (1948).

The new law amended Article 50 to provide, *inter alia*, that the

> ". . . orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States. . . ." Article 50(h), Articles of War.[31]

Article 76 of the U.C.M.J. is the direct and immediate descendant of Article 50(h) of the Articles of War. In the 1949 hearings on the proposed U.C.M.J., the *ad hoc* committee appointed by the Secretary of Defense to draft the bill merely noted that Article 76 "is derived from A.W. 50(h) and is modified to conform to terminology used in this code." *Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498*, 81st Cong. 1st Sess., 1222 (1949). In testimony before the subcommittee, Professor Edmund M. Morgan, Jr. and Felix Larkin, Assistant General Counsel to the Defense Department, the members of the *ad hoc* committee who explained the bill's provisions to the House subcommittee, never suggested that the finality language would curtail collateral review of court-martial convictions in federal court in any manner. *Id.* at 603-604, 1222-1223. In short, the perfunctory attention paid to the Article throughout the entire legislative process supports the view that it was intended merely to recodify Article of War 50(h) without affecting

[31] Article 50-½ was eliminated.

substantive change.[32] And we have seen that Article of War 50(h) did not affect the historical availability of collateral review in a variety of forms.

Senate Report No. 486, 81st Cong. 2nd Sess. (1950), on the bill stated, with respect to Article 76:

> "This Article is derived from AW 50(h) and is modified to conform to terminology used in this code. Subject only to a petition for a writ of habeas corpus in Federal court, it provides for the finality of court-martial proceedings and judgments."

It is upon this and a similar reference to habeas corpus in the House Report that the government relies in urging that habeas corpus is the only form of collateral review permitted under Article 76 (Govt. Brief at 24). However, nothing in the hearings indicated that habeas corpus was to be the sole method of review; habeas corpus was probably referred to in the Reports because it was the method of collateral review that was customarily followed and that was commonly known to the Congressmen. See *Augenblick v. United States, supra*, 377 F.2d at 592. Thus Senator Kefauver, the Chairman of the Senate subcommittee that worked on the bill and the floor manager on the Senate floor, emphasized to the Senate that "the point I am trying

[32]Since the U.C.M.J. was enacted as a result of criticism of the military justice system, see *Senate Report No. 486*, 81st Cong. 2nd Sess. (1950), it would run counter to the very purpose of that Act (which was to provide greater protections to servicemen) to hold that Congress intended to cut off resort to federal courts for servicemen who wished to raise constitutional challenges to court-martial proceedings and convictions.

to make is that the pending bill adds nothing new in the matter of finality of court-martial proceedings . . . ." 96 *Cong. Rec.* (daily ed.) 1414.[33] Compare *Shaughnessy v. Pedreiro*, 349 U.S. 48, where the Court held that a deportation order could be challenged by a declaratory judgment action despite language in the Senate Reports on the Immigration and Nationality Act of 1952 to the effect that habeas corpus was the only available remedy. See the dissenting opinion of Mr. Justice Minton, 349 U.S. at 56-57.

Indeed, the government's brief in *Gusik* itself recognized that the finality provisions of Articles 50(h) and 53 of the Articles of War, and the then-recently passed Article 76 of the U.C.M.J., have identical meaning, and do not preclude collateral review. See Brief for Respondent in *Gusik v. Schilder*, October Term 1950, No. 110, pp.12-18.[34]

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[33]Even those who opposed the proposed U.C.M.J. on the grounds, *inter alia*, that it failed to provide direct review by the federal courts of military law decisions, were agreed that it did not alter the prior availability of collateral review other than by habeas corpus. See, *e.g.*, Keefe and Moskin, *Codified Military Injustice — An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 Cornell L.Q. 151 (1949), introduced into the record and discussed favorably by Senator Morse, 96 Cong. Rec. 1434-1441. The article noted that court-martial determinations "will still be open to collateral attack," as, for example, by habeas corpus or a suit for back pay in the Court of Claims. 96 Cong. Rec. 1439.

[34]As already noted here, the *Gusik* Court held that Article 53, whose language with respect to finality was identical to that contained in Article 76, did no more than describe "the terminal point for proceedings within the court-martial system," 340 U.S. at 132, and specifically noted that collateral judicial review was not limited to habeas corpus but embraced a wide variety of forms of action. 340 U.S. at 133, n.3.

D. If Article 76 Does Bar Collateral Review Other Than By Habeas Corpus, It Is Unconstitutional.

Any doubts as to whether or not Congress intended to limit collateral review of court-martial determinations other than by habeas corpus should be resolved in favor of allowing review. For if Article 76 indeed does cut off such review, thereby preventing numerous servicemen from ever presenting to an Article III court constitutional challenges to their court-martial convictions, it is manifestly unconstitutional.

This Court has never explicitly decided the question of whether a defendant against whom the government initiates criminal charges (or upon whom the government seeks to impose severe limitations upon liberty or property) should have an opportunity to present his constitutional claim to an Article III court at some point in the judicial review process. See *Gusik v. Schilder, supra*, 340 U.S. at 133; *Johnson v. Robison, supra*, 415 U.S. at 373-374. Rather the Court has strained, often imaginatively, to find avenues by which constitutional rights ultimately can be presented to a federal court, thereby avoiding the constitutional issue.[35] Nevertheless, the central role of Article III courts in the constitutional scheme, as emphasized in numerous opinions of this Court, assures that the answer to the question must be in the affirmative. See

[35]See *e.g., Monongahela Bridge Co. v. United States*, 216 U.S. 177; *Estep v. United States, supra; Shaughnessy v. Pedreiro, supra; Brownell v. Tom We Shung, supra; Johnson v. Robison, supra*

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953), reprinted in Hart & Wechsler, *The Federal Courts and the Federal System*, pp. 330-360 (2d Ed. 1973).

Under Article III, "the judicial Power of the United States shall be vested" in the Supreme Court and such inferior federal courts as Congress may "ordain and establish," and extends to all "Cases and Controversies arising under the Constitituon . . . ." Article III, therefore, creates in the federal judiciary a separate and co-equal branch of the national government. Article III courts "are the acknowledged architects and guarantors of the integrity of the legal system." Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239, 274 (1955), and they have the ultimate responsibility of passing upon questions of individual rights and liberties arising under the Constitution. *Cf., Marbury v. Madison*, 1 Cranch 137; *United States v. Nixon*, ____ U.S. ____, 94 S.Ct. 3090 (1974).

Accordingly, the Court never has sanctioned curbs on the judicial power of Article III courts so as to foreclose completely the opportunity to present constitutional claims before such courts.[36] Indeed, the Court

[36]In each case in which the court sanctioned *some* curbs on the judicial power of federal courts, there has remained open another avenue to protect constitutional rights in Article III courts, and ultimately in this Court. For example, in *Ex Parte McCardle*, 7 Wall.506, where the Court upheld the power of Congress to withdraw this Court's *appellate* jurisdiction over habeas corpus review, the avenue of original Supreme Court habeas corpus jurisdiction remained open, and subsequently was explicitly upheld by the Court in *Ex Parte Yerger*, 8 Wall.85. Similarly, denial of a

repeatedly has emphasized that the fundamental role of Article III courts must be preserved.[37] Thus, in *Crowell v. Benson*, 285 U.S. 22, the Court held that:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.* at 60.

The significance of the *Crowell* case often is misunderstood. While the Court divided, with Justices Brandeis, Stone and Roberts dissenting, on the issue of whether *de novo* judicial review was required of administrative determinations of "jurisdictional facts," there was no disagreement on the fundamental principle that questions of law especially questions of constitu-

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draftee's remedy to test his induction in *Falbo v. United States*, 320 U.S. 549, was later shown to be no more than a simple requirement of exhaustion of administrative remedies; the draftee was free to raise his claim of unlawfulness in a defense to a subsequent prosecution. *Estep v. United States*, 327 U.S. 114. See also *Lockerty v. Phillips*, 319 U.S. 182, and *Yakus v. United States*, 321 U.S. 414, where defendants were required to raise constitutional challenges under the Emergency Price Control Act of 1942 exclusively before a special Emergency Court of Appeals, but still had available the avenue of *certiorari* review in this Court. These and other similar cases are discussed and analyzed in Hart & Wechsler, *The Federal Courts and the Federal System*, *supra*, pp.330-360. More recently in *Palmore v. United States*, 411 U.S. 389, where the Court upheld the provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, requiring that "local" crimes be *tried* before Article I judges, *certiorari* was available to this Court to review constitutional and other errors. 411 U.S. at 396.

[37] At least unless, in time of civil strife, the civilian courts cannot remain open. *Ex Parte Milligan*, 4 Wall. 2.

tional law—must ultimately be reviewable in an Article III Court. See Hart & Wechsler, *supra* at 339-340. This was made clear several years later in *St. Joseph Stock Yards v. United States*, 298 U.S. 38, where Justice Brandeis, in a concurring opinion joined by Justices Stone and Cardozo, wrote:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84.

Similar views often have been expressed by other members of the Court, as compelled by both Article III and the due process clause of the Fifth Amendment. See, *e.g.*, *Martin v. Hunter's Lessee*, 1 Wheat.304, 328-329; *Stark v. Wickard*, 321 U.S. 288; *Estep v. United States*, *supra*, 327 U.S. at 120, 127, 132-133 (Rutledge and Murphy, J.J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-582; See *Ng Fung Ho v. White*, 259 U.S. 276, 284-285, and cases cited therein.

But, it might be asked, how can one have a right to present a constitutional claim or defense to an Article III court when Congress has discretion not to create any inferior federal courts,[38] and to create exceptions to the appellate jurisdiction of the Supreme Court? There are several answers to this seeming contradiction.

First, the "exceptions clause," like any other

[38]See *Palmore v. United States*, 411 U.S. 389, 401; *Sheldon v. Sill*, 8 How. 441. But see *Martin v. Hunter's Lessee*, *supra*.

constitutional provision, cannot be read *in vacuo*; its scope must be determined as part of a unified document providing for one Supreme Court, supremacy of the federal law, and due process of law. Accordingly, Congress is not free to restrict the appellate jurisdiction of the Supreme Court in a way that would negate the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law." Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201-202 (1970).[39]

More fundamentally, the twin powers to create or not inferior federal courts and to make exceptions to this Court's appellate jurisdiction cannot be viewed in isolation; those powers must be exercised in a way that preserves due process of law and the judicial power of the United States. While Congress may have some leeway in deciding in what Article III courts to repose the federal judicial power, it does not have power to repose it nowhere. Otherwise, the role of the federal judiciary as a separate and co-equal branch of government would be destroyed.

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[39]See also Hart & Wechsler, *supra* at 331 (Congress' exercise of the "exceptions clause" "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. Intra. L. Rev. 178 (1967). Thus, it has been argued that the "exceptions clause" was intended solely to deal with the problem of appellate review of findings of fact by a jury. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53 (1962); Berger, *Congress v. the Supreme Court* 285-96 (1969). But see Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-06 (1965).

The point was made by Mr. Justice Story in his opinion in *Martin v. Hunter's Lessee*, *supra*, and in his *Commentaries on the Constitution*, where he wrote:

> "If Congress possess any discretion on the subject, it is obvious that the judiciary, as a co-ordinate department of the government, may, at the will of Congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may, or ought to be exercised. The whole argument, upon which such an interpretation has been attempted to be maintained, is that the language of the Constitution, 'shall be vested,' is not imperative, but simply indicates the future tense. This interpretation has been overruled by the Supreme Court, upon solemn deliberation [citing *Martin v. Hunter's Lessee*]." 3 *Commentaries on the Constitution* 449 (1833).

Justice Story, of course, overstated his case. He argued that Congress must vest all of the judicial power not vested as an original matter in the Supreme Court in one or more inferior federal courts. As we have seen,[40] this part of Justice Story's argument is no longer tenable, if indeed it ever was. The flaw in Justice Story's analysis was that he failed to give proper scope to the historical and constitutional role of the state courts as "guarantors of constitutional rights." Hart & Wechsler, *supra* at 359. Congress need not vest the entire federal question jurisdiction as an original matter in lower federal courts because the state courts are available to decide such questions in the exercise of their general jurisdiction. *Palmore v. United States*,

[40]See n. 38, *supra*.

supra, 411 U.S. at 401, 407. As long as the Supreme Court possesses appellate jurisdiction over the state courts, at least with respect to federal questions, the constitutional scheme of Article III is preserved. See Hart & Wechsler, *supra*.

Accordingly, Congress may be free to restrict or abolish the jurisdiction of the lower federal courts provided that it leaves undisturbed the general jurisdiction of the state courts and the appellate or *certiorari* jurisdiction of this Court, or it may be free to make exceptions to the latter jurisdiction provided that it permits a remedy either in some lower Article III court, or, as an original matter, in this Court.[41] But it cannot be presumed that the Founders intended to confer a federal judicial power, embodying due process of law and judicial review, and that at the same time they intended to bestow upon the national legislature the means to destroy that judicial power and substitute rule

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[41] This was the view of Henry Wheaton, reporter for this Court in the early nineteenth century, who wrote a series of articles in the *New York American* in July and August, 1821, under the signature "A Federalist of 1789." Wheaton argued that Congress does have a duty to vest the federal judicial power in some Article III court with respect to all cases "arising under" federal law. The power need not be vested at all in *inferior* federal courts, however, as long as the Supreme Court retained appellate jurisdiction over the state courts for all cases not vested in lower federal courts: "... so far as Congress may constitutionally restrain *original* jurisdiction as to such cases, they must give that which is *appellate*; and appellate jurisdiction where there is no original federal jurisdiction, must, of course, be exercised on the judgment of the state courts. ..." *New York American*, August 3, 1821 (emphasis in original), as quoted in Hart & Wechsler, *supra* at 314-315, n.2.

by executive or administrative bureaucracy. See Hart & Wechsler, *supra* at 331.[42] For such a scheme would create the means for destruction of the very constitutional scheme of separation of powers that the 1787 Convention endeavored to create. As this Court had occasion to note most recently:

> "Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the Federal courts by Article III, section 1 of the Constitution can no more be shared with the executive branch than the chief executive, for example, can share with the judiciary the veto power, or the Congress share with the judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite Government. The Federalist No. 47, p. 313 (C.F. Mittel ed. 1938). We therefore reaffirm that it is 'emphatically the province and the duty' of this Court 'to say what the law is' . . . [citing *Marbury v. Madison, supra*, 1 Cranch at 177]." *United States v. Nixon, supra*, 94 S.Ct. at 3106.

Nor can the military be viewed as an exception to the general rule. While this Court has found that the

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[42] *Palmore v. United States, supra*, is not contra. There, the Court merely held that Congress need not provide for criminal *trials* of all congressionally created crimes in Article III courts; it did not address the problem of whether Congress could preclude all review of constitutional questions in Article III courts. Indeed, review by *certiorari* ultimately was available in this Court, and Palmore in fact obtained such review. 411 U.S. at 396.

military is a society with special needs of discipline and good order, *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974), it clearly is not beyond the judicial power of the United States. Servicemen are entitled to the basic guarantees of due process of law, *Burns v. Wilson*, *supra*, and are entitled to raise constitutional claims in Article III courts. *Gusik v. Schilder*, *supra*. Indeed for reasons recognized by this Court, it is precisely in military courts that the greatest danger to constitutional rights may exist. Military tribunals do not "rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property." *Toth v. Quarles*, 350 U.S. 11, 17. Accordingly, constitutional questions raised in military tribunals ultimately must be susceptible of review by an Article III court. *Gallagher v. Quinn*, *supra*.

Therefore, the total deprivation of collateral review (other than by habeas corpus) of legal determinations of military tribunals, which would flow from the government's reading of Article 76, would be contrary to the deepest principles of Article III and the Fifth Amendment to the Constitution.

POINT III.

A UNITED STATES DISTRICT COURT MAY ENJOIN A PENDING COURT-MARTIAL WHERE CLEAR AND SUBSTANTIAL VIOLATIONS OF A SERVICEMAN'S CONSTITUTIONAL RIGHTS WILL OCCUR IF THE COURT-MARTIAL IS ALLOWED TO TAKE PLACE, NO MATERIAL FACTS ARE IN DISPUTE, NO INTERPRETATION OF SPECIALIZED MILITARY LAW IS NECESSARY, AND THERE IS LITTLE PROBABILITY THAT THE RIGHTS ASSERTED CAN BE VINDICATED IN THE MILITARY COURTS.

Since Article 76 does not limit federal court jurisdiction over decisions of military tribunals to review by habeas corpus only, see Point II, *supra*, there is no statutory or constitutional "jurisdictional" limitation upon the exercise of a federal court's equity powers prior to a court-martial. No equivalent exists to the anti-injunction statute, 28 U.S.C. §2283, which, with certain major exceptions,[43] acts as a bar to federal court injunctions against pending state court judicial proceedings. The question of whether or not such injunctions may be entered, therefore, is one of the proper policy to be followed by federal courts within the very broad area of their federal question jurisdiction.

The government draws an analogy to the judicially developed comity doctrine, by which federal courts

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[43] *E.g.*, 42 U.S.C. §1983 and 28 U.S.C. §1343; see *Mitchum v. Foster*, 407 U.S. 225.

abstain from interference with pending state court prosecutions except in cases of bad faith enforcement or where there is a likelihood of irreparable harm,[44] and argues that that doctrine should be fully applied to court-martial proceedings (Govt. Br. at 20-26). But there are fundamental differences between state criminal proceedings and trial by court-martial; analysis of those differences supports a less stringent application of the comity doctrine allowing a broader range of discretion within which district judges may decide whether or not to intervene in court-martial proceedings.

First, and most fundamentally, the special respect and deference afforded to the "independent" sovereignties of the states is of unique historical and cosntitutional moment and has been emphasized repeatedly by this Court.

> "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'" *Younger v. Harris, supra*, 401 U.S. at 41.[45]

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[44] *Younger v. Harris*, 401 U.S. 37; *Dombrowski v. Pfister*, 380 U.S. 479; *cf., Steffel v. Thompson*, 415 U.S. 452.

[45] See also *Truax v. Corrigan*, 257 U.S. 312, 344 (Holmes, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting); *Hawks v. Hamill*, 288 U.S. 52; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501; *Burford v. Sun Oil Co.*, 319 U.S. 315, 318; *Darr v. Burford*, 339 U.S. 200, 204; *Lousiiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29; *Johnson v. Louisiana*, 406 U.S. 356, 376-377 (Powell, J., concurring); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40.

The state courts play a central and essential role in the constitutional scheme as "the primary guarantors of constitutional rights," Hart & Wechsler, *supra* at 359; we have seen that the predominant historical view is that Congress need not have created lower federal courts at all, but rather could have remitted all controversies as an original matter to the state courts.[46]

The historical tradition and practice with respect to the military on the other hand, is quite different; rather than affording the military room for independence from federal civilian authority, the policy has been to narrow the scope of the military's authority and to render it subservient to the civilian government. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2; *Duncan v. Kahanamoku*, 327 U.S. 304, 307, 318; *Reid v. Covert*, 354 U.S. 1, 21; *Toth v. Quarles*, 350 U.S. 11, 23; *O'Callahan v. Parker*, 395 U.S. 258. There were few issues that concerned the leaders of the American Revolution so deeply as the fear that the military arm of our government might dominate the civilian. Indeed, as the *Reid* Court pointed out, 354 U.S. at 29, the Declaration of Independence itself protested that George III had "affected to render the Military independent of and superior to the Civil Power." Thus, there can be no room for the view that the military may escape civilian control or be treated as an independent sovereign. *Parisi v. Davidson*, 405 U.S. 34, 51 (Douglas, J., concurring).

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[46]With the exception, of course, of those cases for which the Supreme Court has original and exclusive jurisdiction, and provided that some Article III court may ultimately pass on questions of federal constitutional law. See Point IID, *supra*.

The opposing historical and constitutional attitudes toward the states on the one hand and the military on the other are justified, especially with respect to the judicial systems of each. The respect for and sensitivity to constitutional rights and liberties is much greater among state civilian authorities and state courts than in the military. State courts have a long common law tradition of due process. State court judges deal with the full range of judicial problems, and have as their primary responsibility the protection of the rights guaranteed by the Constitution. Accordingly, it may be presumed that a state court criminal defendant will suffer no irreparable harm if he must raise constitutional defenses as an initial matter before the trial court. *Younger v. Harris, supra*, 401 U.S. at 49.

Unfortunately, but perhaps inevitably, the same cannot be said about the military. The military's major purpose is to fight and prepare for wars; as the Court has often noted, its concern for individual rights is secondary at best. *Toth v. Quarles, supra*, 350 U.S. at 17-18; *O'Callahan v. Parker, supra*, 395 U.S. at 262; *Reid v. Covert, supra*, 354 U.S. at 21, 29. Moreover, the protections of indictment by grand jury and trial by jury are not present in military courts-martial; these are precisely the means by which an accused in a civilian trial may be protected against arbitrary executive or judicial action. "On many occasions, fully known to the Founders of this country, jurors - plain people - have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices." *Toth v. Quarles, supra*, 350 U.S. at 18-19. See also *United States v. Spock*, 416 F.2d 165, 181-183 (1st Cir. 1969).

Finally, the institutional framework by which the independence of federal and many state judges is assured is not present in the military. For example, federal judges have life tenure, compensation which cannot be reduced in their lifetime, and can be removed only by impeachment; military judges not only lack these protections, but they, and the members of court-martial juries, are further subject to subtle, or not so subtle, pressures of command influence:

> "The suggestion of the possibility of influence in the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger." *O'Callahan v. Parker, supra*, 395 U.S. at 264.

Thus, close analysis reveals that the various rationale for "comity" between the federal and state court systems simply do not apply to attempts to enjoin military courts-martial. In fact, precisely because those rationale are not applicable, a closer degree of federal court surveillance over the military courts is both desirable and appropriate.

There are, of course, several countervailing considerations. Certainly it would defeat the purpose of a separate military "judicial" system if an accused serviceman could freely interrupt court-martial proceedings to raise any conceivable issue in federal court. And military trials may involve factual determinations and interpretations of special military laws and regulations which military courts and judges are in the best position to make, at least in the first instance. In such

cases, as the Court suggested in *Noyd v. Bond*, 395 U.S. 683, 696 and n. 8, the best course may well be to allow the military courts to decide the question before the federal courts intervene.

Where, however, no substantial relevant factual questions are in issue, and where interpretation of specialized and often arcane military law is not necessary, the rationale for federal court abstention is mitigated considerably. And, when the military acts to deprive the accused of substantial federal rights going to the very integrity of the trial process itself, and where there is little probability that the rights asserted will be favorably viewed by the military courts, the necessity for federal court intervention becomes compelling.

The cases clearly support a "flexible [and] discretionary"[47] doctrine permitting the federal courts to intervene in such cases; this Court repeatedly has sanctioned interference with ongoing military proceedings to correct fundamental constitutional errors. See, *e.g.*, *Billings v. Truesdale*, 321 U.S. 542; *Toth v. Quarles*, *supra*; *Reid v. Covert*, *supra*; *McElroy v. Guagliardo*, 361 U.S. 281; *Parisi v. Davidson*, *supra*. In *Noyd v. Bond*, *supra*, the Court explained that in cases such as *Toth*, *Reid*, and *McElroy*, *supra*, it had intervened because the claims raised pure questions of constitutional law about which the military courts possessed no expertise, and because the claims were jurisdictional. 395 U.S. at 696, n. 8. The crucial elements would appear to be the presence of factual disputes and the existence *vel non* of "expertise":

[47] See *Dooley v. Ploger*, 491 F.2d 608, 613 (4th Cir. 1974).

> "While ... [the petitioners] in the civilian cases [*Toth, Reid, McElroy*, etc.] challenged 'the right of the military to try them at all' under the constitutional grant of court-martial jurisdiction, this type of claim is present in every constitutional and jurisdictional attack. The significant distinction ... is that ... [r]esolution of the civilian cases principally involved traditional questions of constitutional law ....[T]he civilian cases involved no disputed questions of fact and no questions on which the expert opinion of the military courts would be helpful." *Dooley v. Ploger*, 491 F.2d 608, 614 (4th Cir. 1974). [48]

The Fourth Circuit in *Dooley* also emphasized that a federal court should consider the likelihood of an effective remedy within the military justice system in deciding whether or not to intervene. If military law on the subject at issue is clear so that further resort to the military courts probably would be "futile," exhaustion should not be required. 491 F.2d at 614-615. This view echoed that of this Court in *Parisi v. Davidson, supra*:

> "[T]he court should stay its hand only if the relief [sought] ... would also be available ...

[48]The *Dooley* Court held that the attempts there to enjoin courts-martial must fail because of the presence of factual disputes going to the issues of whether the offenses charged were "service-connected" within the meaning of *O'Callahan v. Parker, supra*. The court did not rule out injunctive relief subsequent to factual determinations by the military court; rather, it merely held that the servicemen involved must exhaust their military remedies "to the extent that a military tribunal is given the opportunity to find the facts of service-connection, as well as guilt or innocence, and to impart its expert understanding of the impact of specific offenses on military capability." 491 F.2d at 610.

with reasonable promptness and certainty through the machinery of the military justice system in its processing of the court-martial charge." 405 U.S. at 41-42.

The government argues, in effect, that a federal court may never intervene in pending court-martial proceedings.[49] It insists on finding, quite wrongly, an inflexible and categorical principle of general application that perceives the military establishment as entirely apart from and beyond the reach of the civilian courts, at least until after full exhaustion and resort to *habeas corpus* if available. It would recreate the military as a separate sovereign, even more independent than the states and to which even more deference would be due. In so doing, it would ignore the warnings and lessons of history, reasoned analysis, the meaning of the Constitution, and the course of judicial decisions in this and other courts.

Even in the armed forces, a criminal prosecution is not a mere routine detail, a matter of internal housekeeping. It is a unique and drastic procedure, having all of the purposes and effects of a civilian criminal proceeding. Procedures so grave as this are not committed to the military establishment, under our Constitution, unfettered by the basic safeguards of the Bill of Rights, or unencumbered by the precious inconvenience of civilian judicial scrutiny, necessary to make those basic safeguards work. *Burns v. Wilson*, 346 U.S. 137; *Kauffman v. Secretary of the Air Force*, *supra*. Ordinarily, of course, the civilian judicial scrutiny

[49]With the possible exception of attacks based upon lack of personal jurisdiction.

of military criminal administration is adequate if it comes at the termination of a military prosecution; and ordinarily - as in state criminal matters - it is properly reserved until that time. But where the usual reasons for abstention are not present,[50] and where an accused serviceman raises fundamental constitutional questions going to the very integrity of the court-martial process, the interests of justice require the immediate equitable intervention of the federal civilian courts.

POINT IV.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING APPELLEE'S COURT-MARTIAL UNTIL HE AND HIS CHIEF DEFENSE COUNSEL ARE GIVEN FULL ACCESS TO THE EVIDENCE UPON WHICH THE CHARGES ARE BASED.

The district court acted well within the limits of its discretionary power to issue a preliminary injunction on the "access to documents" cause of action. The issue involved pure questions of constitutional law, affecting the legitimacy of the trial process itself. There were no disputed material facts nor were there problems of interpretation and application of specialized military law. There was a strong likelihood that the constitutional issues would not receive favorable consideration in the military; indeed, appellee had raised the issues

[50] *I.e.*, the presence of disputed material factual issues and questions of "military" law and practice.

unsuccessfully before the military courts, including the Court of Military Appeals. There was little question that, on the merits, appellee was correct in his consitutional claim. See *Point V, infra*. And, there was a strong probability of irreparable harm if the district court did not intervene when it did.

A. The issue of access to evidence and documents involved a pure question of constitutional law: whether the limitations that the government sought to place upon defense counsel's access to and use of relevant and material evidence violated DeChamplain's Fifth and Sixth Amendment rights to due process, a fair and speedy trial, and effective assistance of counsel. There was no dispute as to the fact of the restrictions upon access and use. There was no dispute as to the relevance and materiality of the evidence at issue, which included the very documents that DeChamplain allegedly sought to turn over to a foreign agent and the record of DeChamplain's first court-martial on the identical charges. Significantly, the government never has argued that the documents are not relevant and material. Thus the only issue presented to the district court was whether the limitations upon use of the relevant evidence imposed by the Air Force and approved by the military court were constitutionally permissible.

B. We show in *Point V, infra*, that the access limitations imposed by the court-martial violate due process principles enunciated repeatedly by this Court and the lower federal courts since the earliest days of the Republic. Indeed, the government never presented a serious argument to the contrary, either in the district court or in its Brief here. The district court surely was correct in concluding that:

"Plaintiff has demonstrated the likelihood of his prevailing on the merits; specifically, ... that civilian counsel is entitled to full access, subject to a protective order, to all documents relevant to the issues to be tried" (J.S. at 28).

Even more important, however, the limitations upon access fundamentally affected the integrity of the entire court-martial proceeding. The restrictions effectively denied to DeChamplain the opportunity to present and to have the court-martial consider recognized defenses to the espionage charges with which he was charged: whether the documents at issue "relate" to the national defense within the meaning of the Espionage Act, and whether the documents were in the "public domain" prior to the acts that DeChamplain is alleged to have committed. See *infra*, pp. 61-64. These were the very defenses for which civilian counsel was called into the case, and they were the very defenses upon which DeChamplain intended to base his defense (See App. at 39, 56-58). By denying the accused the opportunity to present these defenses in a meaningful manner, the court-martial in effect ousted itself of "jurisdiction"; intervention of the district court was necessary to prevent an arbitrary exercise of military authority that no longer could be identified as "judicial."[51]

[51]In *Whelchel v. McDonald*, 340 U.S. 122, 124, *reh. den.* 340 U.S. 923, the Court held that the denial to a court-martial defendant of an opportunity to present a relevant defense in an effective manner goes to the question of the jurisdiction of the court-martial to try the accused. This view was reaffirmed in *United States v. Augenblick*, 393 U.S. 348 at 352, where the Court noted that such a question is one of "traditional" jurisdiction. See also *United States ex rel. Mankiewicz v. Ray*, 399 F.2d 900 (2d Cir. 1968), where Judge Friendly, concurring, noted that federal

C. Despite the clear import of the decisions of the federal courts requiring that a defendant and his counsel be granted meaningful access to relevant evidence, even if that evidence involves national security matters, an accused serviceman cannot obtain such access in the military courts.[52] The Manual for Court-Martial (1969 Ed.) itself provides that:

> "Official communications and documents containing military or state secrets, including diplomatic correspondence, are privileged from disclosure in a court-martial proceeding where in the opinion of the head of the executive or military department or government agency concerned such disclosure would be detrimental to the national interest." MCM, par. 151(a).

Accordingly, the military courts, including the Court of Military Appeals, have refused to permit disclosure of relevant evidence on the basis that the evidence was classified. See *United States v. Levy*, 39 C.M.R. 672, 681 (ABR 1968), *ptn. for rev. den.*, 18 U.S.C.M.A. 627 (1969) (See Brief for Appellee in *Parker v. Levy*, ____ U.S. ____, 94 S.Ct. 2547 (1974), pp. 102-107); *cf.*, *United States v. Harvey*, 8 U.S.C.M.A. 538, 25 C.M.R.

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intervention in court-martial proceedings is not ordinarily appropriate "where a court-martial has already been convened *and there was 'no showing 'that it would not consider [the accused's] defense[s]'*" (emphasis added).

[52]We show in *Point V C, infra*, that there can be no justification in "military necessity" or otherwise for denying access to evidence to servicemen accused of espionage while granting access to defendants accused of the identical crime before a federal district court.

42.[53] Indeed, this Court has noted that "in a court-martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution." *O'Callahan v. Parker, supra*, 395 U.S. at 264, n. 4.

In the face of this authority within the military, DeChamplain nevertheless attempted to obtain access to the relevant evidence, before both the military judge and the Court of Military Appeals. Predictably, both attempts failed. See App. 62-63; *DeChamplain v. McLucas*, 22 U.S.C.M.A. 462, 47 C.M.R. 552 (1973).

Given these failures and the weight of military law authority, it is clear that there is little or no reasonable likelihood that DeChamplain ever could vindicate his Fifth and Sixth Amendment rights to access within the military court system. The only forum to which he could turn was the federal district court.

D. If DeChamplain were forced to undergo a trial under the conditions imposed by the military, the harm would have been irreparable; indeed, the prejudice would have been so clear and damaging that federal court intervention would have been proper even under

[53]Similarly, the military courts have approved the exclusion of the public and or the press pursuant to MCM, paragraph 53(e) in cases involving "national security" matters, thereby depriving the defendants of their right to a public trial. See, *e.g.*, *United States v. Neville*, 7 C.M.R. 180 (1952); *United States v. Northrup*, 31 C.M.R. 599 at 603 (1961); compare *United States v. Gorin*, 111 F.2d 712, 720 (9th Cir. 1940), *aff'd*. 312 U.S. 19; *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950), *cert. den.* 342 U.S. 920.

the strict comity doctrine of *Younger v. Harris, supra,* urged by the government.

It must be remembered that at the time the court-martial was scheduled to begin, DeChamplain already had been in confinement for over two years and had undergone one trial, which was tainted by illegal government action. The access restrictions would have deprived DeChamplain of the opportunity to present adequate defenses to the espionage charges, and further would have deprived him of the effective assistance of counsel of his choice, chosen specifically because of counsel's experience and expertise in defending similar charges. The chances of an acquittal under such circumstances clearly were minimized: it is probable that DeChamplain would have had to wait until he exhausted his military remedies (which we have seen would have been futile) and sought *habeas corpus* relief in the federal courts before his constitutional claims would have been vindicated. And even then he would not have been entitled to release, but rather would have faced a *third* court-martial on the same charges.

It is true that in the usual criminal case, allegation of an error that ultimately might result in reversal is not sufficient to enjoin the trial. *Younger v. Harris, supra.* But where the "error" involves a denial of the opportunity to present defenses and to be represented by counsel, the trial itself becomes a mockery of justice. See *United States v. Bergamo,* 154 F.2d 31 (3d Cir. 1946). The ordeal of a criminal trial is a costly and emotionally wrenching experience. To allow a trial to proceed where such fundamental errors exist, and where the ultimate result most probably will be yet a *third* trial under proper and lawful conditions, is to impose

arbitrary and unnecessary harm upon the accused. Under these circumstances it can in no sense be said that the defendant can protect his rights in the normal course of a "*single* criminal prosecution." *Younger v. Harris*, 401 U.S. at 46 (emphasis added).

If there is any discretion whatsoever for a federal district court to intervene to prevent irreparable harm and to protect the unmistakeable rights of an accused, see *Point III, supra*, surely there can be no better case for the exercise of such discretion than under the circumstances which were present here.

POINT V.

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE GOVERNMENT EITHER MUST PROVIDE APPELLEE AND HIS CHIEF DEFENSE COUNSEL WITH UNLIMITED ACCESS TO AND USE OF RELEVANT EVIDENCE, SUBJECT TO A PROTECTIVE ORDER AGAINST DISCLOSURE TO THOSE NOT INVOLVED IN THE DEFENSE OF THE CASE, OR IT MUST DISMISS THE CHARGES.

DeChamplain was charged with unlawfully attempting to pass "classified" documents "relating" to the national defense to unauthorized persons, in violation of the Espionage Act of the United States, 18 U.S.C. §793. At his first court-martial, these and several other "classified" documents were put directly into evidence; they were not only relevant, but were central to the issues to be decided by the court-martial and were, in fact, the basis of the entire prosecution. At a

subsequent trial, the same documents would again be the basis for the prosecution and the primary evidence upon which the government would rely.

A. Unlimited Access To The Documents And Record Of The Prior Trial Was Essential To A Proper Defense And To Effective Assistance of Counsel.

It is difficult to imagine a plainer and more shocking interference with a defendant's right to pursue a free and vigorous defense than to deny to his counsel the right to see, possess, refer to, and utilize as necessary the documents which are the very basis of the charges upon which the defendant is to be tried.

The espionage statute, 18 U.S.C. §793, poses singular problems of construction and application, requiring, *inter alia*: (a) a full exploration of the nature of the documents; (b) a full exploration of the extent to which the information in the documents, and information similar in nature, was and is publicly available, and how it came to be publicly available; (c) a full exploration of the consequences which reasonably could have been contemplated to result from their communication.[54]

[54] *Gorin v. United States*, *supra*; *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945); *Boeckenhaupt v. United States*, 392 F.2d 24 (4th Cir. 1968), *cert. den.* 393 U.S. 896; *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952), *cert. den.* 344 U.S. 838; *United States v. Butenko*, 384 F.2d 554 (3rd Cir. 1967), *vacated sub nom. Alderman v. United States*, 394 U.S. 165. See generally, Edgar and Schmidt, *The Espionage Statutes and Publication of National Defense Information*, 73 Col. L. Rev. 929 (1973).

In *Gorin v. United States*, 312 U.S. 19, the Court interpreted section 793 narrowly in order to save it from constitutional attack on grounds of vagueness. First, it held that the statutory proviso that the defendant have "reason to believe that the information is to be used to the injury of the United States or to the advantage of a foreign nation" requires the government to prove that the defendant acted with *scienter*. 312 U.S. at 27-28. Second, the Court held that the relationship of the documents to national defense is a question for the trier of fact, and that the connection between the material at issue and the national defense must be "reasonable and direct" and "not a strained or arbitrary one." 312 U.S. at 31-32. The trier of fact may not be bound by the mere fact that the documents or information involved were classified; it must be allowed to determine that question independently. See *United States v. Heine, supra*, at 817; *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965).

Finally, where the information transmitted by the defendant has been otherwise disseminated to its recipient or to the public by official or unofficial channels, the defendant may not be convicted of espionage:

> "As declared in *Gorin v. United States*, . . . it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all." *United States v. Heine, supra*, 151 F.2d, at 816 (L. Hand, J.).

The court in *Heine* also held that it made no difference that the information in question was not passed on in precisely the form in which it was publicly available. "The section is aimed at the substance of the proscribed information, not at the act of making it more readily available for use." 151 F.2d at 817.

It is evident, therefore, that in an espionage prosecution, the information contained in the documents is in essence the *corpus dilecti* of the alleged crime. Accordingly the trial court must be permitted to hear evidence delving in detail into the connection between the particular material at issue and the national defense. In fact, in the recent case of *United States v. Russo and Ellsberg*, No. 9373 - WMB - CD (C.D. Calif. 1973), which charged violations of Section 793, the defense was permitted to present extensive evidence on the issues of relationship of the documents in question to the national security and of the reasonable knowledge of the defendants that communications of the documents would damage the national security (Boudin Affidavit, App. 36-52).

It therefore is plain that defense counsel must be permitted to retain copies of documents upon which the charges are based in order to put on an effective defense at trial. The materials must be carefully examined paragraph by paragraph, page by page, in order to follow through with possible defense strategies. Only in this way can the defense possibly meet the government's contention that the materials constitute papers relating to the "national defense." And only in this way can the defense conduct the proper research to determine whether or not the materials were in the "public domain" prior to the alleged unlawful dissemination.

Such documents can be of value to the defense only if they are at all times available in the offices of defendant's counsel. This is the standard practice in espionage prosecutions brought in the federal courts. For example, in *United States v. Russo and Ellsberg, supra*, and in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. den.*, 342 U.S. 920, copies of great numbers of classified documents were given to defense counsel long before trial for retention and use as counsel saw fit (See Boudin affidavit, App. 37).

B. In A Criminal Prosecution, The Government Must Disclose To The Defendant And His Counsel All Evidence Which Would Be Material Or Relevant To The Defense Or Suffer Dismissal Of The Case, Even When Such Evidence Includes Asserted "State Secrets"

In a criminal case the government is under a duty to disclose material evidence to the defense. Rule 16, Federal Rules of Criminal Procedure:[55] see Notes of the Advisory Committee on Rules; Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276 (1966); *Dennis v. United States*, 384 U.S. 855, 870-876. Where the government fails to comply with its duty, especially upon a request for access or disclosure by the defendant, it must suffer dismissal of the indictment. *Brady v. Maryland*, 373 U.S. 83; *United*

[55]It is to be noted that the Rules of Criminal Procedure shall be applied in cases before courts-martial and other military tribunals, except where impractical. Article 36(a), UCMJ; 10 U.S.C. §836(a).

States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. den.* 342 U.S. 920; *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).[56]

In this case, we have seen that the documents sought were more than mere "arguably relevant" or possibly exculpatory *Brady* material; rather, they were *central* to the entire case. Therefore, *a fortiori*, full disclosure was required.

The Air Force asserted a "privilege" to refuse or limit access by the accused and his counsel because of the classified nature of the evidence and because disclosure purportedly would be detrimental to the national interest. Although there is a limited "national security" privilege in civil actions, *Reynolds v. United States*, 345 U.S. 1, it has not been extended to criminal prosecutions because of the fundamental unfairness that would impose on criminal defendants.

> ". . . [S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Reynolds v. United States*, *supra*, 345 U.S. at 12.

[56]The proper standard for disclosure under *Brady*, *supra*, has been stated as whether the evidence "would be helpful to the defendant." *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967), reiterating the principles of *Levin v. Katzenbach*, 368 F.2d 287 (D.C. Cir. 1966). See, also, *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), *cert. den.* 375 U.S. 931; *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *United States ex rel. Butler v. Maroney*, 319 F.2d 622, 627 (3d Cir. 1963).

In *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), the court reversed convictions because the government had not disclosed "confidential" departmental documents which the defendants had asserted to be relevant to their defense. Chief Judge Learned Hand stated:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and lay bare their subject matter. The Government may choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them." 142 F.2d 506.

See also, *United States v. Beekman, supra.*

In *United States v. Coplon, supra*, Chief Judge Hand applied the *Andolschek* doctrine to information which the government claimed to be privileged national security material. The *Coplon* court reversed a conviction for conspiracy to deliver defense information to a citizen of a foreign nation on the grounds that the failure of the prosecution to disclose wiretapping evidence claimed to constitute "state secrets" was a *per se* violation of the rights of the defendant. The court cited the *Andolschek* opinion and noted once again that the government had a choice in the matter: "[T]he prosecution must decide whether the public prejudice

of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." *Id.* at 538.[57]

The government itself has acknowledged on various occasions that it has a duty to make full disclosure to the defense, even when such disclosure may involve "state secrets." The government's brief in this Court in the cases of *Ivanov v. United States* and *Butenko v. United States*, Nos. 11 and 1972, October Term 1968,[58] recognized the "hard choice" between possibly "jeopardizing internal security or risking foreign embarrassment, on the one hand," and not prosecuting the accused, on the other (Govt. Brief at 9). In deciding these cases, and rejecting another claim for governmental privilege regarding certain illegal wiretap reports, the Court carefully noted the government's position:

[57]See also *Alderman v. United States*, 394 U.S. 165; *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Beekman*, *supra*; *United States v. Burr*, 25 Fed. Cas. 187 (C.C.Va. 1807) (Marshall, C.J.); *Cf., Jencks v. United States*, 353 U.S. 657, 672; *Roviaro v. United States*, *supra*. In *United States v. Schneiderman*, 106 F.Supp. 731, 736-737 (C.D.Calif. 1952), the court held that the defense was entitled to any document that was arguably "competent, relevant and material to any degree not clearly de minimis," even if its release would affect national security. Indeed, the *Schneiderman* court found that the documents in question were of doubtful value to the defense but held that all such doubts were to be resolved in favor of the defense. See also *United States v. Coplon*, *supra*, 185 F.2d at 638: "in truth it is highly unlikely that Coplon suffered the slightest handicap by the judge's refusal." In the instant case, however, the documents sought are central to the case, and unlimited access to them is fundamental to an effective defense.

[58]Decided together with *Alderman v. United States*, *supra*.

> "The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made *even though attended by potential danger to the reputation or safety of third parties or to the national security*—unless the United States would perfer dismissal of the case to disclosure of information. . ." *Alderman v. United States, supra*, 394 U.S. at 181 (emphasis added).

In sum, the cases as well as fairness and due process require full disclosure by the government of all material relating to the criminal charges it has initiated. Indeed, the cases and authorities cited above make clear that the right of a criminal defendant to disclosure is absolute and unquestioned.

C. The Rule Requiring Access To Relevant Evidence Applies To Courts-Martial.

The government's argument on the access issue reduces to the flat assertion that the constitutional right to disclosure of and access to relevant evidence does not apply to military trials, or at least to *this* military trial. This view turns on the discredited notion that servicemen are not entitled to the protections of the Bill of Rights.

> "It is true that some early cases can be cited for the proposition that military personnel have no constitutional rights whatsoever. Whatever validity this view may have had in the past, it has been true for at least two decades that military personnel are entitled to some form of due

process." *Bertoniere v. Stevenson*, 496 F.2d 1001, 1006 (5th Cir. 1974).

See, Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962); Sherman, *The Civilianization of Military Law*, 22 Me.L.Rev. 3 (1970); Note, *Servicemen in Civilian Courts*, 76 Yale L.J. 380, 391-392 (1966).

The seminal case was *Burns v. Wilson*, 346 U.S. 137, where the Court held that:

> "[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians - from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." 346 U.S. at 142-143.

In response, the lower federal courts and the Court of Military Appeals have integrated the United States Constitution into military justice; one by one, most of the specific guarantees of the various constitutional amendments have been held applicable to the military.[59] The standard applied has been set forth

[59]See, *e.g.*, *Hagopian v. Knowlton*, 470 F.2d 20 (2d Cir. 1972) (right to due process hearing in disciplinary and discharge proceedings); *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966) (right to presumption of innocence); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965) (right to effective assistance of counsel); *Powers v. Hunter*, 178 F.2d 141 (10th Cir. 1949) (right to be protected against cruel and unusual punishment); *Carlson v. Schlesinger*, 364 F.Supp. 626 (D.D.C. 1973) (First Amendment

similarly by the federal courts and by the Court of Military Appeals as requiring the application of constitutional provisions except where they are "expressly or by *necessary* implication inapplicable." *United States v. Jacoby*, 21 U.S.C.M.A. 428, 29 CMR 244 at 246-247 (1960) (emphasis added).[60] The dramatic change from the traditional view was highlighted by the Court of Military Appeals in its decision in *United States v. Tempia, supra*:

> "The time is long since past . . . when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 37 C.M.R. at 253.

Whatever test is used, once it is conceded, as it must be, that an accused serviceman facing court-martial is entitled to due process and a fair trial, the rule

speech); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (First Amendment religion); *United States v. Tempia*, 16 USCMA 625, 37 CMR 249 (1967) (right to Miranda-type warnings); *United States v. Hartsook*, 15 USCMA 291, 35 CMR 263 (1965) (right to protection against unreasonable searches and seizures); *United States v. Sweeney*, 14 USCMA 599, 34 CMR 379 (1964) (right to compulsory process); *United States v. Schlack*, 14 USCMA 371, 34 CMR 151 (1964) (right to speedy trial); *United States v. Culp*, 14 USCMA 199, 33 CMR 411 (1963) (right to counsel); *United States v. Kemp*, 13 USCMA 89, 32 CMR 89 (1962) (right against self-incrimination); *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960) (right to confront witnesses).

[60]See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), *cert. den.* 396 U.S. 1013; *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. den.* 401 U.S. 982; *Betonie v. Sizemore, supra*; *Schita v. King*, 133 F.2d 283 (8th Cir. 1943); *Melvin v. Laird*, 365 F.Supp. 511 (E.D.N.Y. 1973).

requiring disclosure of and access to the very evidence upon which the charges are based must be applied to court-martial proceedings. For if those guarantees are to be at all meaningful, then they must ensure that a defendant be permitted to present an effective defense with the effective assistance of counsel.[61] See *Whelchel v. McDonald*, *supra*. As the Court noted in *Powell v. Alabama*, 287 U.S. 45, 59:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Nor can there by any "military necessity" in imposing the access restrictions at issue here. For while DeChamplain is charged with espionage, he is charged under the civilian espionage statute as assimilated into military law under the third clause of Article 134.[62]

[61] The right of a serviceman to the effective assistance of civilian counsel of his choice is preserved by statute, Article 38, U.C.M.J., 10 U.S.C. §838, and by the Constitution. *Betonie v. Sizemore*, *supra*; *Ashe v. McNamara*, *supra*; *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968), *cert. den.* 394 U.S. 934; *Henry v. Warner*, 357 F.Supp. 495 (C.D. Cal. 1973); *Application of Stapley*, 246 F.Supp. 316 (D. Utah 1965); *Denton v. United States*, 144 Ct. Cl. 840, 863 (1959), *cert. den.* 361 U.S. 821; *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F.Supp. 295 (1947); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973); *contra*, *Dingle v. Warner*, 490 F.2d 358 (9th Cir. 1974).

[62] The government now concedes that DeChamplain is charged only under the third clause of Article 134, and not under the first two clauses (Brief in Opposition to Motion to Dismiss at 2).

Indeed, there is no separate military espionage statute. The government has no greater interest in protecting "state secrets" in an espionage prosecution brought within the military than it does in an espionage case brought under the identical statute in civilian court. While that interest may be substantial, it does not permit the government to invoke the jurisdiction of a court and then to deprive the defendant of an opportunity to defend himself effectively. The government must either disclose the evidence for use in the defense of the charges, or forego prosecution.

CONCLUSION

The appeal should be dismissed. Alternatively the decision of the district court should be affirmed with respect to the "access to documents" cause of action.

Respectfully submitted,

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